1474 d 23.
England. - Court of Chancery. - Reports of Cases. - Abridgments and Indexes. 1000.
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# A General Abridgment OF CASES IN EQUITY,

Argued and Adjudged in the

## High Court of Chancery, &c.

WITH

Several CASES never before publiſhed, Alphabetically digeſted under proper TITLES; with *Notes* and *References* to the Whole.

And Three TABLES,

The Firſt of the NAMES of the CASES, the Second of the ſeveral TITLES, with their *Diviſions* and *Subdiviſions*; and the Third, of the Matter under GENERAL HEADS.

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By a GENTLEMAN of the *Middle Temple*.

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**The Third Edition Corrected.**

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# EQUITY

IN

# CASES

OF

## Contingent Advancement

# THE PREFACE.

*AS this Work appears unrecommended by any authoritative Approbation, or even a Name in the Title Page, which might introduce it with Advantage; it may perhaps be neceſſary to ſay ſomething in this Place relating to its Deſign, and the Pretence it makes of being Uſeful.*

*The Principal Deſign of it, is to collect and diſpoſe, by Way of Abridgment, under proper Heads, all ſuch Caſes adjudged in the Courts of Equity, as are any where in Print; and this is conceived to be a better Method than compoſing a regular Inſtitute of thoſe Matters: In the Way of Inſtitute, much muſt always be taken from the private Opinion of the Writer; in this of an Abridgment, Knowledge flows from the Points adjudged, and authentick Reſolutions which the Reader has before him.*

*In Purſuance of this Deſign, the Reader muſt expect to find ſeveral Caſes abridged from Books which he may reckon of little Weight or Authority; as well as ſeveral which have been contradicted by better and later Reſolutions; but that no Body may be miſled, the Caſes on both Sides, with their Reaſons, are generally laid down for the Reader to make his own Concluſions.*

*The Diviſion of the Heads is ſuch, as to the Author ſeemed beſt, and fitteſt to direct the Generality of Gentlemen acquainted with theſe Matters, to the Point they are in ſearch of, tho' it is not to be expected, that in this Article, every Body ſhould be ſatisfied, Men having ſuch different Modes of Thinking, that in Strictneſs, hardly any Two can be ſaid to Common-place alike. All that can be done to Remedy this Inconvenience, is to make proper References from Head to Head, where any Degree of Similitude appears; which has been attempted here.*

*It*

# The PREFACE.

*It has been thought proper, under the Head of* Deviſes, *to inſert all the Caſes upon that Subject which have been determined in the Common Law Courts, as they receive the ſame equitable Conſtruction in them that they do in the others.*

*If that, and the making Obſervations in other Heads, how Equity differs from the Common Law, ſhould be thought to exceed the Deſign, it's hoped the Benefit of the Reader will make a ſufficient Apology for it, as alſo for the Author's Inſertion of ſeveral Caſes not hitherto in Print, which have been adjudged by thoſe excellent Chancellors,* Somers, Harcourt, Cowper, *and* Macclesfield: *Theſe Caſes in the Table are marked with an* Aſterisk, *to diſtinguiſh them from thoſe extracted from the Books already publiſhed; and to prevent the Obſcurity which might happen from Aiming at Conciſeneſs, they are given more at large than the others; which being already in Print every Reader has an Opportunity of applying to, when he conceives any Doubt concerning the Abridgment of them.*

*What perhaps moſt of all requires an Apology, is, that all the Caſes in this Book, adjudged ſince the Year* 1726, *were taken by the Author, in Chancery or at the Rolls; all that he offers in Excuſe is, that he uſed his utmoſt Care and Judgment; but he is aſſured, that if they ſuffer nothing by paſſing thro' his Hands, the great Abilities and unqueſtionable Integrity of the Learned and Honourable Perſons preſiding in thoſe Courts, muſt render them the moſt uſeful Part of this Work.*

# THE NAMES OF THE CASES.

*Thoſe mark'd * were never publiſhed before.*


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| Garfoot *and* Garfoot, | 264 | 1 |
| Gerrard *and* Vaux, | 25 | 1 |
| * Gerrard *and* Gerrard, | 337 | 3 |
| Gibſon *and* Whitacre, | 15 | 7 |
| Gilpin *and* Smith, | 60 | 1 |
| * Gifford *and* Gifford, | 88 | 5 |
| Girling *and* Lee, | 141 | 2 |
| Gilbert *and* Witty, | 190 | 19 |
| Gibbons *and* Summers, | 192 | 6 |
| Glover *and* Faulkner, | 233 | 1 |
| Gladman *and* Henchman, | 287 | 3 |
| Gorman *and* Salisbury, | 22 | 15 |
| Goddard *and* Keate, | 47 | 7 |
| Gore *and* Knight, | 66 | 4 |
| Goldſmith *and* Bruning, | 89 | 4 |
| Goodwin *and* Ramſden, | 161 | 4 |
| Goodright *and* Corniſh, | 189 | 14 |
| Goodfellow *and* Burchett, | 204 | 7 |
| Goodrick *and* Brown, | 255 | 1 |
| Godfrey *and* Chadwell, | 318 | 7 |
| * Gooding *and* Gooding, | 342 | 3 |
| * Gold *and* Rutland, | 346 | 18 |
| * Goodwin *and* Archer, | 350 | 4 |
| * Goddart *and* Garret, | 371 | 2 |
| Green *and* Wood, | 18 | 12 |

# *The Names of the Caſes.*


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| Grunſton *and Lord* Bruce, | 108 | 4 |
| * Grubar *and* Gairand, | 146 | 9 |
| * Grice *and* Gooding, | 151 | 4 |
| Greenhill *and* Greenhill, | 174 | 4 |
| Groſvenor *and* Cartwright, | 238 | 23 |
| Griffith *and* Rogers, | 245 | 8 |
| * Graham *and* Stamper, | 308 | 2 |
| Greaves *and* Mattiſon, | 337 | 1 |
| Grant *and* Hedding, | 366 | 4 |
| Guilmore *and* Battiſon, | 17 | 4 |
| Gundry *and* Baynard, | 282 | 6 |

H.

| | | |
|---|---|---|
| Hamden *and* Brewer, | 1 | 1 |
| * Hall *and* Butler, | 20 | 7 |
| Hatton *and* Gray, | 21 | 10 |
| Hallifax *and* Higgins, | 28 | 4 |
| Harcourt *and Lady* Anderſon, | 29 | 5 |
| Hall *and* Bodily, | 35 | 5 |
| Hampton *and* Spencer, | 36 | 5 |
| * Haſtings *and* Draper, | 39 | 13 |
| Haymer *and* Haymer, | 63 | 3 |
| Hanne *and* Stephens, | 72 | 4 |
| Haycock *and* Haycock, | 72 | 5 |
| Hays *and* Hays, | 78 | 4 |
| Hall *and* Potter, | 89 | 3 |
| *Duke* Hamilton *and Lord* Mohun, | 90 | 6 |
| Hardham *and* Roberts, | 122 | 6 |
| Harvey *and* Mountague, | 146 | 6 |
| Hall *and* Hall, | 152 | 5 |
| Hancock *and* Hancock, | 153 | 8 |
| Hampſon *and Lady* Sydenham, | 282 | 5 |
| * Hamilton *and the Earl of* Macclesfied, | 285 | 5 |
| * Harriſon *and* Forth, | 331 | 6 |
| Harvey *and* Mountague, | 331 | 1 |
| Hall *and* Atkinſon, | 333 | 4 |
| * Haiſtwell *and* Grainger, | 351 | 7 |
| * Haning *and* Ferrers, | 357 | 10 |
| * Hayle *and* Burrodale, | 36 | 8 |
| Harriſon *and Lord* North, | 365 | 1 |
| Harman *and* Vanhatton, | 371 | 3 |
| Hampton *and* Spencer, | 380 | 5 |
| Hains *and* Hains, | 402 | 3 |
| Hedges *and* Everard, | 18 | 7 |
| Heighter *and* Sturman, | 21 | 12 |
| Heſter *and* Weſton, | 40 | 3 |
| * Herbert *and* Herbert, | 66 | 2 |
| Henchman *and* Ayer, | 72 | 3 |
| Heathcote *and* Fleet, | 76 | 6 |
| Henningham *and* Henningham, | 117 | 5 |
| * Hedges *and* Everard, | 131 | 12 |
| Heron *and* Merick, | 143 | 11 |
| Heyward and Lomax, | 147 | |
| Herbert *and* Forbale, | 172 | 4 |
| Herne *and* Herne, | 203 | 2 |
| Hedger *and* Rowe, | 206 | 3 |
| Hen *and* Conisby, | 145 | 1 |
| *Sir* Edw. Heath *and* Henley, | 303 | 2 |
| Hedworth *and* Primate, | 325 | 6 |
| * Helier *and* Jones, | 337 | 3 |
| * Heli *and* Bond, | 342 | 6 |
| * Hennell *and* Kelland, | 377 | 2 |
| Hide *and* Petit, | 49 | 3 |
| Hinks *and* Nethorp, | 77 | 11 |
| * Hillyard *and* Stapleton, | 86 | 3 |
| Higford *and* Higford, | 219 | 5 |
| Hill *and* Wigget, | 232 | 8 |
| Hide *and* Parrot, | 361 | 10 |
| * Holtham *and* Ryland, | 18 | 8 |
| Hollis *and* Whiting, | 19 | 1 |
| * Holmes *and* Buckly, | 27 | 4 |
| Holford *and* Burnell, | 36 | 1 |
| Holland *and* Colliford, | 54 | 2 |
| Howard *and* Hooker, | 59 | 1 |
| How *and the Tenants of* Muſgrave, | 79 | 1 |
| Holt *and* Holt, | 85 | 5 |
| Hooley *and* Booth, | 106 | 5 |
| Howell *and* Waldron, | 136 | 2 |
| *Lord* Hollis *and Lady* Car, | 139 | 3 |
| Holmes *and* Plunkett, | 188 | 12 |
| Hoby *and* Hoby, | 220 | 9 |
| * Holcroft *and* Smith, | 224 | 5 |
| * Hodgſon *and* Thornton, | 228 | 5 |
| Holt *and* Mill, | 229 | 9 |
| Hodgſon *and* Hodgſon, | 231 | 5 |
| Hovroll *and* Waldron, | 235 | 1 |
| Hodges *and* Waddington, | 236 | 6 |
| Hooper *and* Eyles, | 262 | 5 |
| Hoskins *and* Savoy, | 265 | 4 |
| Howell *and* Price, | 270 | 7 |
| Hobart *and the Counteſs of* Suffolk, | 272 | 7 |
| Holloway *and* Collins, | 300 | 1 |
| Hobbs *and* Norton, | 356 | 8 |
| Hunt *and* Matthews, | 59 | 5 |
| *The Earl* and *Counteſs of* Huntington, | 62 | 4 |

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| Humphreys *and* Hales, | 117 | 4 |
| Hungerford *and* Earl, | 148 | 2 |
| Huberſton *and* Huberſton, | 207 | 8 |
| Huckſtep *and* Mathews, | 213 | 7 |
| Hutton *and* Simpſon, | 216 | 6 |
| * Hunt *and* Berkley, | 243 | 4 |
| Hunſden *and* Cheyney, | 355 | 7 |
| * Humble *and* Bill, | 358 | 4 |
| Hyley *and* Hyley, | 210 | 16 |
| * Hyde *and* Hyde, | 409 | 3 |

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| Jackſon *and* Rawlins, | 3 | 10 |
| * Jacobſon *and* Peer Williams, | 54 | 7 |
| * James *and* James, | 123 | 11 |
| Jay *and* Braine, | 135 | 4 |
| Jackſon *and* Farrand, | 268 | 8 |
| Ibbotſon *and* Rhodes, | 229 | 13 |
| Jervis *and* Bruton, | 87 | 7 |
| Jennings *and* Moore, | 122 | 4 |
| Jenks *and* Holford, | 151 | 6 |
| Jefferys *and* Small, | 290 | 2 |
| Jenkins *and* Powel, | 301 | 1 |
| Jennings *and* Ward, | 312 | 16 |
| Jennings *and* Selleck, | 381 | 7 |
| Jones *and* Lenthall, | 36 | 2 |
| * Jones *and* Powell, | 84 | 2 |
| * Jones *and* Weſtcomb, | 245 | 10 |
| Jolliff *and* Crew, | 286 | 2 |
| Jolley *and* Wills, | 361 | 6 |
| * Jones *and the Lord* Say *and* Seal, | 383 | 4 |
| * Jones *and* Langhton, | 392 | 2 |
| * Jones *and* Nabbs, | 404 | 3 |
| Izraell *and* Narbourne, | 72 | 6 |

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| Kenge *and* Delaval, | 68 | 8 |
| Key *and* Bradſhawe, | 89 | 6 |
| Keat *and* Allen, | 90 | 5 |
| Kettle *and* Townſend, | 123 | 8 |
| Kelly *and* Berry, | 167 | 1 |
| * Keyling's *Caſe*, | 239 | |
| Kettleby *and* Atwood, | 273 | 5 |
| Kew *and* Rouſe, | 292 | 7 |
| Killigrew *and* Killigrew, | 37 | 1 |
| Kingdome and Bridges, | 70 | 12 |
| King *and* Withers, | 112 | 4 |
| *The Earl of* Kildare *and Sir* Morrice Euſtace, | 133 | 4 |
| King *and* Melling, | 181 | 14 |
| King *and* Rumball, | 182 | 20 |
| Kilmurry *and* Geery, | 341 | 4 |
| Knight *and* Bamfield, | 12 | 6 |
| Knight *and* Calthorp, | 33 | 6 |
| Knight and Atkyns, | 274 | 6 |
| * Knowles *and* Spence, | 315 | 5 |

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| Lamas *and* Bayly, | 22 | 14 |
| Lawrence *and* Braſier, | 85 | 4 |
| Langley *and* Baldwin, | 185 | 29 |
| Lamb *and* Archer, | 192 | 8 |
| Lawrence *and* Lawrence, | 218 | 2 |
| * Lake *and* Gibſon, | 290 | 3 |
| * Laundy *and* Williams, | 299 | 3 |
| Lane *and* Williams, | 370 | 3 |
| Lamb *and* Parker, | 410 | 9 |
| Leonard *and Com.* Suſſex, | 12 | 8 |
| Leak *and* Morrice, | 23 | 20 |
| Levil *and* Darrey, | 82 | 9 |
| * Lewkner *and* Freeman, | 149 | 5 |
| * Lewen *and* Lewen, | 159 | 6 |
| Leonard *and the Earl of* Suſſex, | 184 | 26 |
| Lee *and* Hale, | 199 | 1 |
| Lecone *and* Shiers, | 260 | 1 |
| * Leving *and Lady* Caverley, | 281 | 6 |
| * Legat *and* Shewell, | 394 | 7 |
| Lee *and* Lee, | 398 | 7 |
| Lea *and* Libb, | 402 | 6 |
| Lemaine *and* Stanley, | 403 | 9 |
| * Lightbone *and* Weedon, | 24 | 7 |
| Liſter *and* Liſter, | 68 | 3 |
| * Lingen *and* Souray, | 175 | 5 |
| *Sir* Thomas Littleton's *Caſe*, | 211 | 20 |
| * Littlebury *and* Buckley, | 245 | |
| * *Earl of* Lincoln *and* Rolls, | 411 | 11 |
| Lowther *and* Curril, | 21 | 11 |
| Loyd *and* Gunter, | 41 | 1 |
| Longdale *and* Longdale, | 109 | 6 |
| Lomax *and* Hyde, | 126 | 9 |
| * Loeffes *and* Lewen, | 156 | 8 |
| Loddington *and* Kime, | 182 | 23 |
| Love *and* Windham, | 191 | 4 |
| * Loyd *and* Carew, | 260 | 2 |
| *City of* London *and* Garway, | 272 | 5 |


Lockey

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| Lockey *and* Lockey, | 304 | 10 |
| Lucas *and* Holder, | 41 | 3 |
| Lupton *and* Tempeſt, | 6 | 3 |
| Luxford *and* Cheek, | 179 | 6 |
| Luke *and* Alderne, | 300 | 4 |

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| Marſhfield *and* Weſton, | 11 | 14 |
| * *Sir* George Maxwell *and* *Lady* Mountacute, | 19 | 4 |
| * Mallet *and* Halfpenny, | 20 | 6 |
| * Maure *and* Harriſon, | 93 | 5 |
| Man *and* Ballet, | 99 | 4 |
| * Marks *and* Marks, | 106 | 6 |
| Manning and Weſton, | 147 | 2 |
| Mathews *and* Newby, | 156 | 1 |
| Martin *and* Long, | 192 | 9 |
| * Manfield *and* Dugard, | 195 | 4 |
| Martin *and* Clerk, | 201 | 15 |
| * Markant *and* Twiſden, | 211 | 22 |
| Maw *and* Harking, | 249 | 4 |
| *Sir* Humphry Mackworth's *Caſe*, | 283 | 11 |
| Manning *and* Burges, | 286 | 3 |
| Manlove *and* Ball, | 313 | 15 |
| Marſh *and* Lee, | 322 | 1 |
| * Meliorucchi *and* Royal Exchange *Aſſurance Company*, | 8 | 8 |
| Meriel *and* Wymondſal, | 24 | 1 |
| * Medith *and* Wynn, | 70 | 15 |
| Meſgrett *and* Meſgrett, | 111 | 7 |
| Meredeth *and* Jones, | 221 | 4 |
| Minſhull *and* *Lord* Mohun, | 3 | 4 |
| Mitchell *and* Edes, | 45 | 6 |
| Micoe *and* Powell, | 64 | 4 |
| Mildmay *and* Mildmay, | 67 | 4 |
| Milliſh *and* Williams, | 81 | 5 |
| Miller *and* Warren, | 297 | 5 |
| Moor *and* Mayhew, | 38 | 8 |
| Moor *and* Welſh Copper *Company*, | 39 | 14 |
| Moyſes *and* Little, | 53 | 4 |
| Moor *and* Blagrave, | 73 | 10 |
| Morſe *and* Buckworth, | 76 | 7 |
| Monnins *and* Monnins, | 77 | 10 |
| Moor *and* Packer, | 182 | 22 |
| Moyſe *and* Gules, | 293 | 2 |
| Mountague *and* Tidcomb, | 308 | 6 |
| Moor *and* Bennet, | 331 | 7 |
| Morley *and* Morley, | 397 | 1 |
| Mountague *and* Jefferies, | 410 | 5 |
| Muſgrave *and* Daſhwood, | 25 | 5 |
| Murray *and* Wiſe, | 177 | 15 |
| Muſgrave *and* Parry, | 202 | 24 |
| * Murrel *and* Cox, | 247 | 3 |
| Mumma *and* Mumma, | 382 | 8 |

N.

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| Nanney *and* Martin, | 68 | 1 |
| Naſh *and* *Earl of* Derby, | 121 | 19 |
| * Napper *and* Allington, | 166 | 4 |
| Naſh *and* Preſton, | 217 | 1 |
| * Nandick *and* Wilkes, | 393 | 5 |
| Needler *and* Deeble, | 12 | 7 |
| Needham *and* Vernon, | 111 | 6 |
| *Earl of* Newbourgh *and* Wren, | 134 | 3 |
| * Neave *and* Alderton, | 144 | 21 |
| Newman *and* Johnſon, | 197 | 1 |
| Newcomen *and* Barkham, | 214 | 13 |
| Needham *and* Smith, | 224 | 4 |
| Nevil *and* Johnſon, | 227 | 7 |
| Newton *and* Rowſe, | 308 | 3 |
| Newcomb *and* Bonham, | 312 | 13 |
| * Newt *and* Chamberlain, | 366 | 3 |
| Nevil *and* Saunders, | 382 | 1 |
| Niccol *and* Wiſeman, | 43 | 1 |
| * Nicholls *and* Nicholls, | 160 | 5 |
| Nicholls *and* Hooper, | 202 | 22 |
| Nicholſon *and* Sherman, | 237 | 15 |
| Norton *and* Maſcall, | 51 | 8 |
| Norton *and* Sprig, | 60 | 4 |
| Norden *and* Norden, | 138 | 2 |
| Nott *and* Smithies, | 152 | 2 |
| *Duke of* Norfolk's *Caſe*, | 192 | 7 |
| Norden *and* Levett, | 240 | 27 |
| *Sir* Francis North *and* Way, | 255 | 2 |
| North *and* Crompton, | 272 | 3 |
| Noys *and* Mordaunt, | 273 | 3 |
| * *Duke of* Norfolk *and* Brown, | 381 | 4 |

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| * Offley *and* Offley, | 66 | 1 |
| Oglander *and* Baſton, | 69 | 7 |
| Oldham *and* Litchford, | 231 | 4 |
| Oldfield *and* Oldfield, | 266 | 3 |
| * Onſlow *and* South, | 295 | 6 |

| | Page | Caſe |
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| Onyons *and* Tryers, | 407 | 1 |
| Organ *and* Gardiner, | 82 | 2 |
| Orme *and* Smith, | 302 | 2 |
| Orde *and* Herning, | 314 | 2 |
| Orby *and Lady* Mohun, | 343 | 5 |
| Otway *and* Hutton, | 122 | 5 |
| Owen *and* Curſon, | 3 | 6 |
| Oxenden *and* Oxenden, | 67 | 6 |
| * Oxwick *and* Brockett, | 355 | 5 |

P.

| | | |
|---|---|---|
| Parker *and* Palmer, | 17 | 2 |
| Parrot *and* Wells, | 25 | 7 |
| Page *and* Neal, | 40 | 6 |
| * Packer *and* Dykes, | 54 | 6 |
| Paget *and* Read, | 61 | 2 |
| * Parker *and* Blackbourn, | 73 | 17 |
| Parſons *and* Priddock, | 93 | 4 |
| Pawlet *and* Ingres, | 103 | 1 |
| *Dean and Chapter of Saint* Paul's *and* LewisRuggle, | 119 | 5 |
| Parker *and* Turner, | 119 | 7 |
| * Parrot *and* Treby, | 125 | 4 |
| Pamplin *and* Green, | 136 | 3 |
| Parſlow *and* Weedon, | 149 | 7 |
| Parker *and* Thacker, | 180 | 12 |
| * Papillon *and* Bois, | 185 | 30 |
| Paget *and* Voſius, | 195 | 6 |
| Packman *and* Cole, | 216 | 5 |
| * Palmer *and* Danby, | 219 | 6 |
| Pawlet *and* Pawlet, | 267 | 1 |
| Paſworth *and* Moore, | 299 | 2 |
| Palmer *and* Young, | 380 | 2 |
| Pells *and* Brown, | 187 | 4 |
| Perry *and* Perry, | 203 | 4 |
| Pendleton *and* Grant, | 230 | 2 |
| Petty *and* Styward, | 290 | 1 |
| Peter *and* Ruſſel, | 321 | 7 |
| Peacock *and* Spooner, | 362 | 14 |
| Phillips *verſus Duke of* Bucks, | 18 | 10 |
| Anne Pheſant's *Caſe*, | 156 | 11 |
| Phiney *and* Phiney, | 249 | 9 |
| Phillips *and* Phillips, | 292 | 6 |
| * Phillips *and the Pariſh of St.* Clements Danes, | | |
| * Pit *and the Creditors of the Duke of* Richmond, | 3 | 7 |
| Pit *and* Hunt, | 58 | 3 |
| Pile *and* Pile, | 204 | 5 |
| Piggot *and* Penrice, | 209 | 13 |
| Pit *and* Pelham, | 265 | 3 |
| Plymouth *and* Bladon, | 11 | 3 |
| Platt *and* Sprigg, | 386 | 6 |
| Pollard *and* Downes, | 6 | 4 |
| Potts *and* Potts, | 6 | 7 |
| Powell *and* Arderne, | 39 | 2 |
| * Powell *and* Bell, | 60 | 7 |
| Powell *and* Morgan, | 85 | 1 |
| Popham *and* Bampfield, | 108 | 2 |
| * Pott *and* Lee, | 157 | 4 |
| *Counteſs of* Portland *and* Prodgers, | 171 | 1 |
| Powel *and* Powel, | 265 | 3 |
| Powell *and* Morgan, | 269 | 11 |
| *Lady* Poin's *Caſe*, | 284 | 1 |
| Pocock *and* Lee, | 317 | 11 |
| Pope *and* Onſlow, | 325 | 8 |
| Pollard *and* Green, | 342 | 1 |
| * Pollen and Huband, | 412 | 12 |
| *The Protector and Lord* Lumly, | 75 | 2 |
| Price *and* Keyte, | 80 | 2 |
| Pritman *and* Pritman, | 162 | 3 |
| Prideaux *and* Gibbon, | 174 | 2 |
| Prodgers *and* Phrazier, | 276 | 1 |
| Proctor *and* Cowper, | 314 | 3 |
| Pritchard *and* Langher, | 332 | 2 |
| Purefoy *and* Purefoy, | 138 | 1 |
| Purefoy *and* Rogers, | 189 | 13 |
| Pye *and* Georges, | 384 | 1 |

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| Randall *and* Head, | 35 | 2 |
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| * Rafter *and* Stock, | 123 | 12 |
| Rawe *and* Pole | 169 | 3 |
| *Lady* Radnor *and* Vandebendy, | 219 | 3 |
| Randall *and* Bookey, | 272 | 4 |
| *Lord* Ranelaugh *and* Champant, | 289 | 2 |
| Ramſden *and* Langley, | 328 | 5 |
| Raw *and* Pole, | 355 | 6 |
| Reaſon *and* Sacheverell, | 62 | 3 |

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| Rex *verſus Warden of the Fleet.* | 128 | 8 |
| Reeve *and* Reeve, | 221 | 3 |
| Renneſey *and* Parrot, | 301 | 4 |
| Richardſon *and* Sydenham, | 47 | 5 |
| Richardſon *and* Goodwin, | 55 | 5 |
| Rich *and* Jacquis, | 80 | 2 |
| Rich *and* Sydenham, | 88 | 1 |
| Richardſon *and* Lowther, | 101 | 2 |
| *Earl* Rivers *and Earl* Derby, | 268 | 7 |
| * Ridler *and* Ridler, | 279 | 5 |
| Riddle *and* Emmerſon, | 381 | 3 |
| Robinſon *and* Biſs, | 48 | 1 |
| Rowner's *Caſe*, | 69 | 11 |
| Rothwell *and* Widdrington, | 104 | 9 |
| * Roſs *and* Roſs, | 124 | 14 |
| * Rockley *and* Keyley, | 126 | 12 |
| Roper *and* Roper, | 166 | 3 |
| Roſſwell *and* Emery, | 174 | 1 |
| Robinſon *and* Duſgale, | 201 | 16 |
| Rooke *and* Rooke, | 210 | 17 |
| Robinſon *and* Bell, | 237 | 10 |
| Rous *and* Noble, | 238 | 22 |
| * Robinſon *and* Wharton, | 285 | 6 |
| Rutland *and* Molineux, | 63 | 7 |
| Rundle *and* Rundle, | 119 | 9 |
| * Rutter *and* Baldwin, | 226 | 15 |

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| *Lord* Salisbury's *Caſe*, | 109 | 9 |
| Sanſon *and* Ramſey, | 169 | 2 |
| Sayer *and* Sayer | 200 | 9 |
| Sawley *and* Gower, | 275 | 1 |
| Saunders *and* Browne, | 292 | 8 |
| Sayle *and* Freeland, | 345 | 15 |
| * Saunders *and* Nevil, | 292 | 3 |
| Scolefield *and* Whitehead, | 26 | 2 |
| * Scatchmer *and* Foulkard, | 125 | 3 |
| Scatterwood *and* Edge, | 189 | 15 |
| Scot *and* Houghton, | 282 | 8 |
| * Schoolding *and* Green, | 298 | 7 |
| Scudmore *and* White, | 304 | 7 |
| Sewell *and* Maſſon, | 28 | 3 |
| Seabourne *and* Blakſtone, | 61 | 1 |
| Seeling *and* Crawly, | 67 | 5 |
| * Selyard *and* Harris, | 74 | 20 |
| Searle *and* Hale, | 332 | 3 |
| Seybourn *and* Clifton, | 354 | 3 |
| Shelberry *and* Briggs, | 1 | 4 |
| Sherman *and* Sherman, | 12 | 10 |
| Sharp *and* Gammon, | 72 | 7 |
| Sherburn *and* Clerk, | 76 | 9 |
| Sheffield *and Lord* Caſtleton, | 93 | 6 |
| Short *and* Long, | 114 | 7 |
| Shepperd *and* Kent, | 142 | 6 |
| Shaw *and* Weigh, | 184 | 28 |
| *The Earl and Counteſs of* Shaftsbury, | 201 | 10 |
| *Lady* Shore *and* Billingſly, | 243 | 2 |
| Sheldon *and* Weldman, | 304 | 3 |
| Shaw *and* Lady Standiſh, | 353 | 2 |
| Sherman *and* Sherman, | 375 | 2 |
| * Shales *and* Shales, | 382 | 9 |
| Shires *and* Glaſcock, | 403 | 8 |
| Silway *and* Compton, | 104 | 8 |
| Skapholme *and* Hart, | 86 | |
| Slingsby *and* Hale, | 164 | 3 |
| * Smally *and* Smally, | 6 | 3 |
| Small *and* Brackley, | 28 | 7 |
| Smithby *and* Hinton, | 73 | 11 |
| Smither *and* Lewis, | 77 | 13 |
| Smallpiece *and* Anguiſh, | 238 | 19 |
| Smith *and* Tracy, | 249 | 8 |
| Smith *and* Smith, | 267 | 5 |
| | 268 | 4 |
| * Smith *and* Avery, | 269 | 9 |
| Smith *and* Pemberton, | 287 | 2 |
| Smith *and* Aſhton, | 345 | 14 |
| Smith *and* Clever, | 362 | 13 |
| Smith *and* Oxenden, | 369 | 1 |
| Snow *and* Cutler, | 188 | 10 |
| Snell *and* Dee, | 295 | 5 |
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# CAP. I.

## Abatement and Revivor.

(A) What shall abate the Suit & econt'.
(B) Who may revive the Suit, and against whom.
(C) In what Manner may a Suit be revived.

### (A) What shall abate the Suit & econt'.

1. A. Made *J. S.* and his Widow Executors, the Widow was made Executrix upon Condition that she did not marry; they exhibit a Bill, and pending the Suit, the Widow marries; and it was adjudg'd upon a Reference to *Bridgman*, C. J. that the Widow's Marriage (*a*) abated the Suit, altho' it was urged that her Executorship was only conditional. 18 *Car.* 2. between *Hamden* and *Brewer*, 1 *Chanc. Ca.* 77.

(*a*) If any of the Parties, Plaintiffs or Defendants, die, or if a Feme Plaintiff marries, regularly the Suit abates; but with Respect to an Abatement by the Death of the Parties, it must be by the Death of such as are so far material Parties, and concerned in Interest, as to make it necessary to have their Representatives before the Court, before there can be a final Determination of the Cause.

2. If a Promise be made to the Husband and Wife during Coverture, and they bring a Bill for Performance, and pending the Suit, the Wife dies, yet this shall be no Abatement. *Cary* 88. *For the whole Interest survived to the Husband.*

3. So if the Husband and Wife sue in the Wife's Right, and pending the Suit, the Husband dies, yet the Wife may proceed. 3 *Chan. Rep.* 40.

4. So if a Bill be exhibited for a Legacy against Baron and Feme, who is Executrix of the Testator, and pending the Suit the Husband dies, this shall be no Abatement of the Proceedings; but had it been concerning the Wife's Inheritance, it might be otherwise. *Mich.* 1691. between *Shelberry* and *Briggs*, 2 *Vern.* 249.

5. If Jointenants, or Tenants in Common exhibit a Bill, and pending the Suit one of them dies; yet *per Bridgman* L. K. the Suit shall not abate. 3 *Chanc. Rep.* 66. But *Q.* as to Tenants in Common, for a Right descends to their Representatives.

6. If a Cauſe has been heard on a Bill of Interpleader, and a Trial at Law has been directed to ſettle the Right between the Defendants, this puts an End to the Suit as to the Plaintiff; ſo that if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor: Ruled on Motion. 1 *Vern.* 351.

7. The Legal Eſtate in Queſtion in this Caſe was veſted in two of the Defendants as Truſtees in Fee, and the equitable Intereſt in Fee in another of the Defendants; and the Bill was brought by the Plaintiff now *Earl* of *Winchelſea*, the *Earl* of *Nottingham* and his four Sons, to ſupply the Defective Execution of an Agreement made by the Lord *Winchelſea*'s Father, whereby the Eſtate was to be ſettled on the Plaintiffs ſeverally for Life, with Remainder to their firſt and other Sons ſucceſſively in Tail, and a Decree was obtained accordingly; and it was referred to the Maſter to ſettle the Conveyance; after which the *Ceſtui que Truſt* in Fee dies; notwithſtanding which the Earl of *Nottingham* and his Sons attend the Maſter, who reported that he approved of a Draught of a Conveyance, which was a Conveyance only from the Truſtees, in whom the legal Eſtate was veſted, to the Uſe of the Plaintiffs, according to the Decree; but the Plaintiff *Finch*, now Earl of *Winchelſea* (who by a former Settlement was to have been Tenant in Tail) took Exceptions to the Report; one of which was the Abatement of the Suit by the Death of *Ceſtuy que Truſt*, and that the Maſter had no Power to proceed till the Suit was revived. But the Court over-ruled the Exception, and held clearly that when there were ſeveral Plaintiffs or Defendants, that the Death of any of them made an Abatement of the Suit only as to themſelves, and that the Suit continued as to the reſt who were living; and therefore as to the Defendants the Truſtees, that they might well execute a Conveyance of the legal Eſtate, and were not to wait for any Thing that was to be done by others; but if the Plaintiffs ſhould hereafter deſire a Conveyance of the Equitable Intereſt, they muſt revive againſt the Heirs at Law of the *Ceſtuy que Truſt*; and ſo in all Caſes where any Thing was required to be done by the Repreſentatives of the Party dying. It was likewiſe held, that if ſome of the Plaintiffs refuſed to join in bringing a Bill of Revivor, that the others may bring ſuch Bill, and make thoſe who refuſed Defendants. And it was agreed, that a Defendant might bring a Bill of Revivor, as well as the Plaintiff. And it was likewiſe ſaid, that it was every Day's Practiſe to order Money out of Court to the Party entitled by the Decree, notwithſtanding the Death of ſome of the Parties. *Mich.* 1727. between *Finch* and Lord *Winchelſea*.

## (B) Who may revive the Suit, and againſt whom.

1. A (*a*) Deviſee cannot bring a Bill of Revivor for want of Privity, admitted, 1 *Chanc. Ca.* 174.

(*a*) The Reaſons why regularly a Deviſee or Aſſignee cannot bring a Bill of Revivor are, 1*ſt*, Becauſe a Suit hath been look'd upon as a *Choſe in Action*, and conſequently not aſſignable for fear of Maintenance. 2*dly*, And which ſeems the better Reaſon, becauſe where the Party deviſes or aſſigns his Intereſt and dies, if the Deviſee or Aſſignee were to bring his Bill of Revivor againſt the Defendant, the Heir or Executor would be pretermitted, who might have a Right to conteſt ſuch Diſpoſition, and therefore he muſt bring his original Bill, and make the Heir or Executor Party.

2. An Aſſignee ſhall have a *Scire Facias* to revive a Decree, but not before it is ſign'd and inrolled, in like Manner as at Law: If there

there be Judgment for an Annuity, and the Annuitant afterwards ſells the Annuity, the Vendee ſhall have a *Scire Facias* on this Judgment; between *Dunn* and *Allen*, 1 *Vern.* 283. but *vid.* 1 *Vern.* 426. S. C. where it is ſaid that the *Scire Facias* was diſallowed for want of Privity, and a Bill of Revivor was brought, and allowed of by the Maſter of the *Rolls*, altho' it was objected that an Aſſignee or Purchaſor, who came not in in Privity, could in no Caſe revive, but ought to bring an Original Bill to have a Parallel Decree made, in which it may be uſed as an Argument to induce the Court to make the like Decree, that there was ſuch former Decree.

3. As when a Deviſee having brought an Original Bill in Nature of a Bill of Revivor, and the Queſtion was, whether the Defendant ſhould be at Liberty to make a new Defence, and it was held by my *Lord Keeper*, that where a Bill, altho' an Original, is only to ſupply the Want of Privity, and in all other Matters as a Bill of Revivor, the Decree ought to be carried on in the ſame Manner as it would have been on a Bill of Revivor, if the Plaintiff had claimed in Privity; and there is no Reaſon why the Deviſee ſhould not have the ſame Advantage of the Decree, as an Heir or Executor, without entring again into the Merits of the Cauſe; and the Decree on this Bill ought not to be longer or ſhorter than the firſt. Between *Clare* and *Wordale*, *Paſch.* 1706. 2 *Vern.* 548.

4. So if a Bill in Nature of a Bill of Revivor be brought againſt a Deviſee, he cannot diſpute the Juſtice or Validity of the Decree; for then he would be in a better Caſe than an Heir or Executor. *Per Cowper Lord Chancellor*, between *Minſhull* and Lord *Mohun*, 2 *Vern.* 672.

5. If there is a mutual Account Decreed, and there happens an Abatement, the Defendant as well as Plaintiff may in ſuch Caſe revive; between Lord *Stowel* and *Cole*; *vide ſupra* Letter (A) Caſe 7. that the Defendant in any Caſe may revive, as well as the Plaintiff.

6. If an Adminiſtrator obtains a Decree, but dies before Inrollment, the Adminiſtrator *de bonis non* may revive this Decree within the Equity of the (*a*) Statute of 30 *Car.* 2. *c.* 6. Between *Owen* and *Curſon*, 2 *Vern.* 237.

(*a*) By which it is enacted, that an Adminiſtrator *de bonis non* may ſue a *Scire Facias*, and take Execution upon a Judgment had in the Name of an Executor or Adminiſtrator.

7. If a Creditor is admitted by Order to come in before the Maſter, and prove his Debt, and pay his Contribution, he is entitled to revive if the Cauſe abates. *Trin.* 1702. between *Pitt* and the Creditors of the Duke of *Richmond*.

8. If the Plaintiff revives againſt two only, when there were three Defendants to the Original Suit, his Bill ſhall be diſmiſſed. *Cary* 78. *Quære.*

9. But it is not neceſſary to revive againſt a Defendant who never anſwer'd. 1 *Vern.* 308.

10. If a Man marries an Adminiſtratrix, and the Plaintiff obtains a Decree againſt him and his Wife, and the Wife dies, the Plaintiff may proceed againſt the Husband without reviving againſt the Adminiſtrator of the Wife; but the Husband is not bound to anſwer farther than the Eſtate he had with his Wife. Between *Jackſon* and *Rawlins*, *Mich.* 1690. 2 *Vern.* 195.

11. The Plaintiff's Inteſtate had obtained a Decree againſt the Defendant for Payment of a Sum of Money, and alſo for conveying of Lands

Lands and Delivery of Deeds; but before any Thing was done upon it, died inteſtate; and the Plaintiff having brought a *Scire Facias* to revive the Decree, the Defendant demurs, becauſe the Heir was not made a Party, and a Decree cannot be revived by Parts; and if the Heir will not join as Plaintiff, he ought to have been made Defendant. On the other Side 'twas ſaid, that the Heir and Adminiſtrator are not jointly concerned, and each may proſecute *pro Intereſſe ſuo*, and cannot join; and if he had been made Defendant, the Decree would not have been revived againſt him, becauſe the Bill could only have prayed it might have been revived, as to the perſonal Eſtate; and the Court over-ruled the Demurrer, and ſaid it was like a Judgment at Law in Waſte, where there may be two Revivors. It being then objected that the *Scire Facias* is to revive the whole Decree; whereas it ought to be only as to the Perſonalty; the Court allowed the Demurrer as to the Realty, but ordered the Decree to be revived as to the Perſonalty. Between *Ferrers* and *Cherry*, *Mich.* 1701.

## (C) In what Manner a Suit may be revived.

1. IF the Suit abates, the Plaintiff may bring either an Original Bill, or a Bill of Revivor, at his (*a*) Election: Adjudged between *Spencer* and *Wray*, *Trin.* 1687. 1 *Vern.* 463.

(*a*) When a Suit abates, the Plaintiff may bring either an Original Bill, praying that a parallel Decree may be made, or Bill of Revivor, which Revives all the Proceedings had therein before the Decree is ſigned and inrolled; but if the Decree is ſigned and inrolled, it ought regularly to be revived by *Scire Facias*.

2. A Bill of Revivor upon a Bill of Revivor lies. *Mich.* 13 *Car. Hard.* 201. Agreed *per Cur'*.

3. If one be named Defendant in the Original Bill, who is yet alive, he ought not to be named in the Bill of Revivor, becauſe the Suit never abated *quoad* him. *Hard.* 201.

4. But if named in the Bill of Revivor only, he may be named in every Bill of Revivor after, becauſe he was not named Defendant in the Original Bill. *Hard.* 201.

5. A Cauſe being heard, and the Decree ſigned and inrolled, the Plaintiff (the Suit having abated) brought a Bill of Revivor, and the Defendant inſiſted that he ſhould have revived by *Scire Facias*, there being a Decree in the Cauſe; but in Regard there were Proceedings relating to Coſts, *&c.* after the Decree was inrolled, which the *Scire Facias* would not revive, the Court held it well enough. 2 *Chanc. Rep.* 67.

6. If a Cauſe has ſlept 12 Months in Court, there ſhall be no Proceedings had upon it, without firſt ſerving a *Subpœna ad Faciend. Attornat'*. 1 *Vern.* 172.

## CAP. II.

# CAP. II.

# Account.

(A) **Who are intitled to have an Account, against whom it lies, and in what Cases.**

(B) **Matters to be brought into the Account, what shall be allowed or discounted, when an Accountant may charge and discharge himself, and how the Particulars are to be ascertained.**

(C) **What shall be a good Bar to a Demand of an Account, and where an Account once stated shall be concluſive.**

*Vide* the ſeveral *Titles* of **Guardians, Executors,** and **Truſtees,** how they ſhall be charged, and what Allowances they ſhall have.

## (A) Who are intitled to have an Account, againſt whom it lies, and in what Caſes.

1. A Surviving Factor may be compelled to account, not only for himſelf, but likewiſe for his Co-factor, although it was admitted that the (*a*) Executrix of the dead Factor was compellable, and that among Merchants *Jus accreſcendi* hath no Place. 1 *Chan. Ca.* 127.

(*a*) By the Common Law none could be charged in Account, but as Guardian in Socage, Bailiff, or Receiver, except in Favour of Merchants, and for Advancement of Trade, where by the Law of Merchants, one naming himſelf Merchant, might have an Account againſt another, naming him Merchant, and charge him as his Receiver. 1 *Inſt.* 372. *a.* 11 *Co.* 89. Remedies for or againſt the Executors or Adminiſtrators of Guardians, Bailiffs and Receivers, or for or againſt Jointenants, Tenants in Common, their Executors or Adminiſtrators, were uſually had in Chancery. And though now by the Statute 3 & 4 *Ann. cap.* 16. Actions of Account may be brought againſt the Executors and Adminiſtrators of every Guardian, Bailiff, and Receiver, and by one Jointenant and Tenant in Common, his Executors and Adminiſtrators, againſt the other, as Bailiff, for receiving more than his Share, and againſt their Executors and Adminiſtrators; yet ſtill are Matters of Account thought more properly cognizable in Equity than at Law, as the Party can have a Diſcovery of Books, Papers, and the Benefit of the Defendant's Oath; and eſpecially if there are mutual and Variety of Demands, in which Caſes the Parties may more eaſily have an equal Meaſure of Juſtice, by ballancing or diſcounting them before a Maſter; and as this will give a Court of Equity Juriſdiction, ſo will it likewiſe, if there are different Parties concerned in Intereſt; but if any Doubt ariſes about the particular Demand, it may be directed to be aſcertained by an Iſſue and Verdict at Law.

2. If a Merchant employs his Apprentice as a Factor beyond Seas, who dies, the Merchant ſhall have an Account againſt the Adminiſtrator of the Apprentice. *Nel. Chan. Rep.* 125.

3. It was held by the Court, that an Infant was not compellable to account as Factor, tho' it was urged, that by the Cuſtom of Merchants he may, but an Infant may be Executor, and ſhall be charged, becauſe the Law enables him: So he may be charged in Trover, becauſe a Tort, but not on Contract, nor as Bailiff, or for Goods to carry on a Trade; and therefore when Infants are Factors, their Friends ſhould give Security for their Accounting. *Trin.* 1700. between *Smally* and *Smally*.

4. A Truſtee made a Letter of Attorney to *J. S.* to manage and receive the Rents and Profits of the Truſt Eſtate, who did ſo, and accounted to the Truſtee; and now being ſued by the *Ceſtui que Truſt*, inſiſted that the Truſtee, and not he, was to account, and that he having already accounted, he might be quiet as to the Plaintiff; but he was decreed to account to the Plaintiff. *Trin.* 34 *Car.* 2. between *Pollard* and *Downes*, 2 *Chan. Ca.* 121. The Reporter adds; *Note*, That the Truſtee was dead, but that was not yielded as the Reaſon.

5. The Aſſignee of Commiſſioners of Bankrupts brought a Bill to have a Diſcovery and Account of Money received by the Defendant on Behalf of the Bankrupt: The Defendant pleaded, he received it only as a menial Servant to the Bankrupt, and had accounted for it to him already, and that the Commiſſioners had already examined him upon Interrogatories; but the Plea was over-ruled. *Mich.* 1682. between *Wagſtaffe* and *Bedford*, 1 *Vern.* 95. 2 *Vent.* 358. *S. C.* but *quære*, whether there were not Circumſtances of Fraud in this Caſe, or a Combination between the Bankrupt and Servant.

6. For if a Man by Anſwer ſwears, that what he received he received as a menial Servant, and hath paid it over to his Maſter, he ſhall not be put to Account again, but he ought to diſcloſe this Matter in his Anſwer. 1 *Vern.* 136.

7. So on Exceptions to a Maſter's Report, which had reported the Defendant's Anſwer inſufficient; the Lord Keeper declared, That it was ſufficient for a Servant or Apprentice, in Anſwer to a Bill for an Account, to ſay in general, that whatever he received, was by him received and laid out again by his Maſter's Orders. *Mich.* 1683. between *Potts* and *Potts*, 1 *Vern.* 208.

8. The Plaintiff, who was Adminiſtratrix to her Brother, a Captain in Colonel *Churchill's* Regiment of Marines, having prayed an Account of his perſonal Pay, and the Pay of his Servants, and alſo the Pay of the Company; it was inſiſted upon, on Behalf of the Defendants, that ſhe was only intitled to an Account of the Captain's perſonal Pay, and Pay of his Men, and not for the Pay of the Company, although they ſeemed to admit that a Captain for Land-Service was to recruit his Company, but would have it there was a Difference when he was a Captain of Marines; or if the Captain may be intitled, yet his Adminiſtrator was not; but the Court decreed an Account of the Whole. *Hill.* 1711. between *Bellaſis* and *Churchill*, 2 *Vern.* 682.

9. *A.* had a Title to ſome Houſes, by a Settlement made of them on him and his Wife, but being obliged to go beyond Sea, he left the Deed of Settlement with his Brother, who being afterwards committed

mitted a Priſoner, the Defendant entred and enjoyed the Houſes ſeveral Years; and it was decreed, that he ſhould Account for the Rents and Profits to *A. Nel. Chan. Rep.* 285.

10. If a Man, during a Perſon's Infancy, receives the Profits of an Eſtate to which the Infant is entitled, and continues to do ſo for ſeveral Years after the Infant comes of Age, before any Entry is made upon him, yet he ſhall Account for the Profits throughout, and not during the Infancy only. *Paſch.* 1699. between *Yallop* and *Holworthy*, that an Infant ſhall have an Account of Profits againſt an Intruder; *vide* 1 *Vern.* 295. but if there be a Verdict againſt his Title, he muſt recover at Law firſt.

11. But if there is no Truſt nor Infant in the Caſe, nor any Entry made by him who is entitled to the mean Profits, Equity will not decree any Account of the Rents and Profits. 2 *Vern.* 724.

12. If there are three Part-Owners of a Ship, and one of them refuſes to navigate the Ship, and the other Two do it againſt his Conſent, and the Ship is loſt in the Voyage; yet he who refuſed ſhall contribute to the Loſs in Proportion, as he was intitled to have an Account of Profits, had there been any. Between *Strilly* and *Winſon*, 1 *Vern.* 297.

13. Two Perſons agreed for the Purchaſe of an Eſtate in Moieties between them, which Eſtate was ſubject to ſeveral Incumbrances, which were to be diſcharged out of the Purchaſe-Money; one of them had Abatements made to him by ſome of the Incumbrancers of ſeveral Sums due for Intereſt, and otherwiſe, which they, in Conſideration of Services and Friendſhip, agreed ſhould be to his own Uſe; yet on a Bill brought for an Account of the Rents and Profits, the Court would not allow him the Benefit of theſe Abatements, excluſive of the other; but held, that he muſt Account for them, the Purchaſe being made for their equal Benefit, and on a mutual Truſt between them. *Trin.* 17 8. at the *Rolls*, between *Carter* and *Horne*.

## (B) Matters to be brought into the Account, what ſhall be allowed or diſcounted, where an Accountant may charge or diſcharge himſelf, and how the Particulars are to be aſcertained.

1. IF a Mortgagee or Truſtee manage the Eſtate themſelves, there is no Allowance to be made them for their Care and Pains; but if they employ a ſkilful Bailiff, and give him 20 *l. per Annum*, that muſt be allowed, for a Man is not bound to be his own Bailiff. *Per Cur'*, 1 *Vern.* 316.

2. One deviſeth 250 *l.* to his Son, and makes his Wife Executrix, who marries another Huſband; in a Bill brought againſt them for the Legacy by the Son, the Defendants would have diſcounted Maintenance and Education, which the Court would not permit; for it was ſaid that the Mother ought to maintain the Child; but a Sum of Money paid for the Binding of him Apprentice was allowed to be diſcounted. 2 *Vent.* 353.

3. The

3. The Plaintiff came as a Gueſt to the Defendant's Houſe, at her Invitation, and the Defendant inſiſted on 5*l.* a Week for Diet and Lodging, alledging, that ſhe being a Perſon of Quality, and courted by ſeveral Noblemen, much was ſpent in Entertainments, and prayed it may be allowed her in Account; but the *Lord Chancellor* ſaid, it was no honourable Demand, and decreed an Account without any ſuch Allowance, it appearing that ſhe came at her Invitation. Between *Arundell* and *Roll*, *Mich.* 1681. 1 *Vern.* 19.

4. A Marriage Settlement was to all the Sons of the Marriage in Tail Male Succeſſively, and for Want of ſuch Iſſue, to the Daughters, till the Perſon next in Remainder ſhould pay them 3000*l.* On Failure of Iſſue Male, the Poſſeſſion came to the Daughters, who inſiſted that they ſhould hold the Lands until the Remainder-Man thought proper to determine their Eſtate by one intire Payment; but on a Bill brought by the Judgment-Creditors, who inſiſted to be let into a Satisfaction ſubject to this Charge, and in Exoneration thereof, to have an Account of the Rents and Profits, it was decreed at the Rolls, that they ſhould Account for the Profits, and that the Rent ſhould be applied, firſt to pay the Intereſt, and then to ſink the Principal, as in Caſe of a common Mortgage; which Decree was affirmed by my Lord Chancellor, with this Variation, that the Principal ſhould not be ſunk till a third Part was raiſed above the Intereſt, and ſo again when another third Part was raiſed. *Mich.* 1706. between *Blagrave* and *Clunn*, 2 *Vern.* 523.

5. It was inſiſted upon, (and not denied) to be a Cuſtom between Merchant and Merchant, that all Accounts ſhould be evened on either Side, by Way of Eſtoppel, eſpecially when the Buſineſs is of the ſame Employment. 2 *Chan. Ca.* 7.

6. The Defendant had a Bond from the Plaintiff for 50*l.* in 1684, and in 1685 the Defendant lodged and dieted with the Plaintiff, and in 1699 the Defendant brought an Action at Law on the Bond, againſt the Plaintiff, who brought this Bill to have a Diſcount for the Diet and Lodging; and though there was no Agreement for that Purpoſe, and ſuch Length of Time paſſed, yet the Maſter of the Rolls decreed it to an Account, and ſaid, that ſo it ſhould be if the Defendant had been a Bankrupt, the Plaintiff ſhould have had a Diſcount againſt the Commiſſioners or Aſſignees, and that a Diſcount was natural Juſtice in all Caſes. *Hill.* 1699. between *Arnold* and *Richardſon.*

7. So where two Perſons had mutual Dealings, but before their Accounts ſettled, one of them died, and the Survivor brought a Bill againſt his Executors, to have an Account; and that the Plaintiff might (*a*) diſcount what he was to pay out of what the Executors were to pay to him; and it was decreed accordingly, altho' it was objected, it may make a *Devaſtavit* in the Executors. *Mich.* 1701. between *Beaumont* and *Grover.*

(*a*) That there may be a Diſcount againſt the Commiſſioners or Aſſignees of a Bankrupt, *vide* 2 *Vern.* 428. the Caſe of *Peters* and *Soame.*

8. The Plaintiffs were Aſſignees under a Commiſſion of Bankruptcy awarded againſt Sir *Juſtus Beck*, and brought this Bill againſt the Defendants, to compel them to aſſign and transfer to the Plaintiffs ſeveral Shares in their Stock, to which Sir *Juſtus Beck* was entitled, and which in the Year 1720. coſt him between 10 and 1200*l.* The Defendants, by Anſwer inſiſted, that Sir *Juſtus Beck* was one of the

Directors of their Company, and that in the Year 1720, after his Purchaſe of the before-mentioned Stock, the Company lent him about 12000 *l.* and inſiſted that they ought not to be obliged to let the Plaintiffs transfer or diſpoſe of the Intereſt which Sir *Juſtus* had in their Stock, without Payment of the 12000 *l.* borrowed, and that by Virtue of the Act 5 *Geor.* 1. one Account ought to be ſet off againſt the other; and for that Purpoſe they had come in as Creditors under the Commiſſion of Bankruptcy, and had proved their Debt; there was no Pretence that the Money was lent on the Security of the Stock; but it was inſiſted, that on the Credit of the great Parcel of Stock, which Sir *Juſtus* had in their Company at that Time, that they lent him this Money, and therefore would now ſtop his Stock till Payment thereof, or as far as the Value of the Stock would extend, which now by the great Fall of Stocks would by no Means ſatisfy their Debt; but it was decreed at the *Rolls*, and that Decree on an Appeal affirmed by the *Lord Chancellor*, that the Defendants ought to permit the Plaintiffs, the Aſſignees, to transfer and diſpoſe of the Stock for the moſt they could make of it, and that they could not ſtop or retain the Stock for their Satisfaction, either before or by Virtue of the Statute 5 *Geor.* 1. And it was reſembled to the Caſe of the Lord of a Manor and his Copyholders, that the Lord could not refuſe to admit a Perſon to whom one of the Copyholders had ſold his Eſtate, on Account of any Debt due to the Lord by that Copyholder; that as the Lord of the Manor in that Caſe, though he had the Freehold of all the Copyhold Eſtates in him, yet he had no Right to any of the Copyholders private Copyhold; ſo here, tho' the Company had the whole Stock of the Company in them in their corporate Capacity, yet the Stock of each Proprietor was diſtinct, and veſted only in himſelf, wherewith the Company had nothing to do further than they were inveſted therewith by the Charter, or Act of Parliament wherewith they were incorporated and impowered, or ordered to transfer each one's Stock by Transfers to be made in the Books of the Company; which otherwiſe every Proprietor might by Deed, or otherwiſe, have transferred as he thought fit. And it was held, that this Caſe differed from that of the *Hudſon's Bay Company*, decreed *per* Lord *Chancellor*, aſſiſted by *Raymond* C. J. and Mr. Juſtice *Price*, where there was an expreſs By-Law to ſubject the Stock of each Member to ſatisfy the Debts they ſhould owe to the Company. And it was ſaid, that this was not like the Caſe of *Demandray* and *Metcalf*, where a Banker lent 200 *l.* on a Pledge of Jewels, and afterwards lent the ſame Perſon a further Sum of Money on his bare Note; yet he was not admitted to redeem the Jewels without Payment of the Note likewiſe; for there it was between two private Perſons. And it was held not to be within the Statute of 5 *Geor.* 1. which ſpeaks only of mutual Dealings and Accounts, which is not this Caſe, as Sir *Juſtus* had a fixt permanent Intereſt in the Stock, and the Money borrowed without Regard thereto. And the Court held this was not like the Caſe of Partnerſhip, where if any of the Partners borrowed any of the Partnerſhip's Money, his own Share ſhould be anſwerable for it, and he ſhould not be permitted to come into a Court of Equity, and pray an Account of his Share of the Partnerſhip, Stock and Effects, without making Satisfaction for the Debt he owed to the Partnerſhip; for this was a Tranſaction between them as private Perſons, and on a mutual Cre-

dit and Truſt; but the Loan of the 12000*l.* in the preſent Caſe to Sir *Juſtus*, was not in their corporate Capacity, wherein only he ſtood related to them, and held his Stock, but was a Loan by them as private Perſons, for which they could not ſtop his Stock, which he held as a Member of the Company in their corporate Capacity. *Trin.* 1728. between *Meliorucchi* and *Royal Exchange Aſſurance Company.*

9. Colonel *Ruſſel* married the Widow of Lord *North and Grey*, who was Executrix of her Husband, and kept a Book of Accounts relating to his Eſtate, and after ſhe married *Ruſſel*, the ſame Book was kept and continued on. After he went over Governor to *Barbadoes*, and his Wife went with him, as did the Servant that made and kept the Book of Account: And there was Proof in the Cauſe, that the Book was made up from Vouchers, and had paid great Part of the Monies: And the Witneſſes believed all the other Monies were paid, and the Plaintiff charged the Defendant only by the Book; and upon Exceptions taken to the Maſter's Report, the Queſtion was, whether the Maſter ought not to have allowed the Book as a Diſcharge as well as a Charge; and after long Debate, my Lord *Keeper* adjudged it ſhould be allowed as a Diſcharge; and the rather in this Caſe, becauſe Colonel *Ruſſel*, his Lady, and the Servant, were dead in *Barbadoes*, which amounted to Length of Time, which was always held a good Reaſon for allowing of it, and ſo took it to be a good Rule, and fit to be eſtabliſhed, that where a Man was charged only by an Oath, or a Book, the ſame ſhould be his Diſcharge; and the Caſe of *Melliſh* and *Turner*, lately adjudged, was cited, where Books had been loſt in the Earthquake at *Smirna*, ſo that the Plaintiff could only charge the Defendant *Turner* by his own Books, the ſame Books were admitted to be his Diſcharge. *Mich.* 1701. between *Darſton* and *Earl of Oxford & al' Executors of Colonel Ruſſel.*

10. The Defendant was a Houſe-keeper, and her Aunt, who was a very old infirm Woman, lived with her, and ſhe from Time to Time received the Aunt's Money for her, as any was paid; the Aunt died Inteſtate, and the Plaintiff being intitled to a diſtributive Part of her Eſtate, brought a Bill againſt the Defendant, to diſcover what Sums of the Inteſtate's Money ſhe had received for the Inteſtate. She by her Anſwer ſets out ſeveral Sums ſhe had received for the Inteſtate whilſt ſhe lived with her, and at what Time, and that the Inteſtate had immediately put them out again at Intereſt, to ſuch and ſuch particular Perſons, and ſet forth other Sums which ſhe had received and paid over to the Inteſtate. The Cauſe being heard without Proof on either Side, and an Account decreed, which was referred to a Maſter, he by his Report charged the Defendant with the Sums confeſſed by her Anſwer to be received, and ſubmitted to the Court, whether ſhe was not likewiſe to be diſcharged by the ſame Anſwer. The Maſter of the Rolls ſaid, that though he look'd on the Defendant in this Caſe to have acted only in the Nature of a Servant, who by the Juſtice of this Court may, on a Bill brought againſt him by his Maſter's Executors, diſcharge as well as charge himſelf by his Anſwer; yet as the Defendant might in this Caſe have proved her Anſwer, as appears by the Anſwer itſelf, and had not ſo done, he referred it back to the Maſter, and each Side to make what Proofs they could; and he declared, that if the Anſwer was diſproved, as to the Sums put out at Intereſt, he ſhould give no

Credit to it as to other Particulars, elſe inclined it ſhould be a Diſcharge too, as well as a Charge. *Trin.* 1702. between *Bayly* and *Hill.*

11. An Account being of twenty Years ſtanding, it was ordered, that the Defendant may prove on Oath what he cannot prove by Books and cancelled Bonds, it being of ſo long a Standing. Between *Peyton* and *Green*, 1 *Chan. Rep.* 146. An Account of fourteen Years Standing admitted to be proved by Oath. 1 *Chan. Ca.* 127.

12. The Court will not allow any Thing to be placed to Account under the Head of *General Expences*; but the Party muſt name the Particulars. *Nel. Chan. Rep.* 117.

13. The Defendant, on Account, ſhall be diſcharged by his Oath of Sums under forty Shillings, but a Party ſhall not, by Way of Charge, charge another Perſon ſo. 2 *Chan. Ca.* 249. 1 *Vern.* 283. *S. P.* where it is ſaid that he muſt mention to whom paid, for what, and when; *vide* 1 *Vern.* 470. where it is ſaid that the Court being informed, that the Courſe of the Court was, that an Accountant was to be allowed, on his own Oath, all Sums not exceeding forty Shillings each, ſo as the Whole was not 100 *l.* Declared that Rule ſeemed very unreaſonable, and would conſider how to rectify it.

In an Account between the Plaintiff, a Gardener, and the Defendant, a Seedſman, the Defendant ſhall be allowed Sums under forty Shillings, by Way of Diſcharge, upon his Oath; but the Plaintiff ſhall not be allowed any Thing on his Oath. Between *Marſhfield* and *Weſton*, 2 *Vern.* 176. *This is now the eſtabliſhed Practice in Chancery.*

## (C) What ſhall be a good Bar to a Demand of an Account, and where an Account once ſtated ſhall be concluſive.

1. *A.* Prays to have an Account of the Sale of Goods taken in Execution at an Undervalue; the Defendant pleads, that before he bought the Goods of the Sheriff, and afterwards, they were offered to the Plaintiff for the ſame Price he gave for them; and the Plea was allowed good. *Nel. Chan. Rep.* 111.

2. An Account was decreed between the Plaintiff and Defendant; and it being proved, that the Defendant had altered a Bundle of Papers; and it being likewiſe reported by the Maſter, that he had ſuppreſſed the Evidence; the Lord *Chancellor* diſallowed the Defendant's whole Demand, though he ſwore he had produced all the Papers; and his Lordſhip declared he was ſatisfied, that all the Papers were produced. Between *Wardour* and *Berisford*, *Paſch.* 1687. 1 *Vern.* 452.

3. The Bill was to call the Defendant, the Plaintiff's Steward, to an Account; the Defendant by Way of Plea inſiſted, that the Plaintiff had ſued here, and alſo at Law, for the ſame Matter, and having her Election, ſhe choſe to have her Bill diſmiſſed here, and not meeting with Succeſs at Law, ſhe now reſorts back again to this Court; that the Plaintiff had ſeiſed in violent and undue Manner all his Writings and Evidences, and likewiſe impriſon'd his Perſon: The Court

Court held, that a Diſmiſſion upon an Election was no more peremptory than a Nonſuit at Law; and that as to the Taking of the Papers, tho' Detinue of Charters is a good Plea at Law to an Account; yet to ſay that the Plaintiff did once ſeize his Writings, is not good; for it is the *Detainer* that makes the Plea good; and as to the Impriſonment, he may bring his Action; and therefore ruled, that the Defendant ſhould anſwer; but ordered, that whereas there was a conſiderable Sum of Money in the Trunk, that the Money as well as Writings ſhould be reſtored; for though the Defendant may be greatly in the Plaintiff's Debt, yet ſhe muſt not levy her own Debt after that Manner. Between the Counteſs of *Plymouth* and *Bladon*, 2 *Vern.* 32.

4. Tho' an Account be ſtated under Hand and Seal, yet if there appears any Miſtake in it, the Court will order the Parties to go to a new Account. 3 *Chan. Rep.* 18.

5. The Defendant's Teſtator ſtated an Account with the Plaintiff, which was ſigned and ſealed by the Parties; but the Plaintiff afterwards finding that his Servant had paid 200 *l.* for which he had no Credit given him, prayed a new Account againſt the Executor, who pleaded the former Account ſtated, and that he was but an Executor, and knew not how to Account: The Plea was over-ruled, but ordered to proceed no further than Anſwer without Leave of the Court. 27 *Car.* 2. between *Wright* and *Coxon*, 1 *Chan. Ca.* 262. *Nel. Chan. Rep.* 431. *S. P.* 2 *Chan. Ca.* 157. *S. P.*

6. *A.* makes a Jointure of an Equity of Redemption, and afterwards becomes a Bankrupt; the Commiſſioners aſſign this Equity of Redemption, and the Aſſignees ſtate an Account. The Jointreſs brings her Bill to be relieved, alledging Combination between the Aſſignees and the Mortgagee, and that they had allowed more Money than was due on the Mortgage. *Lord Keeper:* The Aſſignees ſtand in the Place of the Husband, and the Account ſtated by them ought to be as concluſive as if ſtated by the Husband; and the Charge is not right in the Bill, being too general; however the Plaintiff had Leave to amend her Bill. Between *Knight* and *Bampfielf*, 1 *Vern.* 179.

7. Mortgagor and Mortgagee ſettle an Account before a Maſter; and now a ſubſequent Mortgagee ſues for a new Account, ſuppoſing the former Account to be falſe, and made by Conſent, but did not inſiſt upon any Particulars; and the Lord *Chancellor* declared, that the Account ſhould bind the ſecond Mortgagee, if the Fraud and Colluſion were anſwered. *Trin.* 29 *Car.* 2. between *Needler* and *Deeble*, 1 *Chan. Ca.* 299.

8. *A.* is Tenant for Life of a Truſt, Remainder to his Sons, *A.* before a Son born brings a Bill againſt the Truſtees, and an Account is decreed, and afterwards taken; this Account ſhall bind the Sons, for all Perſons that could be made Parties were Parties to the Suit. Between *Leonard* and *Com. Suſſex*, *Mich.* 1705. 2 *Vern.* 526.

9. An Account taken, and a Diſtribution decreed in the Spiritual Court of a Perſonal Eſtate; yet a new Account decreed in Chancery. 2 *Vern.* 47.

10. The Plaintiff's Husband and the Defendant had Dealings together as Merchants; the Bill was for an Account; and although it was agreed, that Length of Time was no Bar, yet the Plaintiff's Husband living many Years after the Trade and Dealings between them ceaſed,

and acquieſcing to the Time of his Death, the Court diſmiſſed the Bill, and left the Plaintiff to recover at Law, if ſhe could. Between *Sherman* and *Sherman*, *Mich.* 1692. 2 *Vern.* 276.

11. Among Merchants it is looked upon as an Allowance of an Account current, if the Merchant who receives it does not object againſt it in a ſecond or third Poſt. *Per Hutchins*, *Lord Commiſſioner*, 2 *Vern.* 276.

# CAP. III.

## Affidavits.

(A) **Where an Affidavit is neceſſary,** & econt'.

(B) **Where an Affidavit may be ſaid to be full and ſufficient, and what ſhall be allowed thereon.**

### (A) Where an Affidavit is neceſſary, & econt'.

1. IF a Bill be exhibited, grounded on the Loſs of a Bond; *per Lord Keeper*, As it is the Loſs which intitles the Court to Juriſdiction of the Cauſe, Affidavit muſt be made of it. 1 *Chan. Ca.* 231.

2. But if a Perſon comes only for a bare Diſcovery of a Deed, he need not make Oath of the Loſs of it, as he muſt do when he comes for Relief; for he cannot tranſlate the Juriſdiction, without Oath made of the Loſs of the Deed. 1 *Vern.* 247.

3. So where a Bill was brought for a bare Diſcovery of a Deed, and the Defendant demurred, becauſe the Plaintiff had not made Oath, according to the Courſe of the Court, that he had not the Deed; upon which this Diſtinction was taken and allowed of by the Court, *viz.* That where a Perſon comes for a Diſcovery, and prays Relief, there it is neceſſary for him to make Affidavit of the Want of the Deed; but when he ſeeks but a bare Diſcovery, or to have it produced at a Trial, it is not neceſſary; for it is not to be preſumed

that the Plaintiff in either of the later Caſes would do ſo abſurd a Thing, as exhibit a Bill, if he had the Deed. 1 *Chan. Ca.* 11. 1 *Vern.* 180. *S. P.* But *vide* 1 *Vern.* 59. where the Diſtinction is taken quite contrary, *but ſeems to be the Miſtake of the Reporter.*

4. The Plaintiff had purchaſed the Manor of *Leyborn* in the County of *Kent*, and the Defendant was Tenant of Part thereof by a Leaſe for Years, which was now expired, at the Rent of 80*l. per Annum*; and the Plaintiff by his Bill ſet forth, that the Court-Rolls, Title-Deeds, and Writings belonging to this Manor, were kept in a Cloſet in ſuch a Room at the chief Manſion-houſe, and that after his Purchaſe, the Houſe being repairing, and Workmen in the Houſe, the Defendant took that Opportunity, and got into the Cloſet, and took away all the Writings, and (amongſt others) the Counterpart of the Defendant's Leaſe, and charged that the Defendant had broke ſeveral of the Covenants in his Leaſe; but that for Want of the Counterpart the Plaintiff could not aſcertain his Damages in an Action at Law to be brought concerning the ſame; and therefore prayed a Diſcovery of this Counterpart, and general Relief. To this Bill the Defendant demurred to the Relief only, for that the Plaintiff had not annexed to his Bill the uſual Affidavit, that he had not the Counterpart in his Cuſtody, and gave a full Anſwer, by Way of Diſcovery, to the whole Bill; but the Demurrer was over-ruled, for that the Bill was only for a Diſcovery, and therefore though he charged that ſeveral of the Covenants were broken; yet he did not pray any Recompence or Satisfaction for ſuch Breach, but only complained, that for Want of the Counterpart he could not aſcertain his Damages at Law, ſo that he had wholly an Eye to Law for his Satisfaction; and though he prayed Relief generally, that was only to be applied to the particular Relief he had before prayed, which was a Diſcovery of the Counterpart of the Leaſe. *Trin.* 1729. between *Whitworth* and *Goulding*, *S. P.* As to the General Relief being applied to a Diſcovery, reſolved the ſame Day between *King* and *King*.

5. A Plea of Privilege of an Univerſity need not be upon Oath; but it is ſufficient to aver, that the Party is a Scholar reſident, *&c.* 26 *Car.* 2. between *Prat* and *Taylor*, 1 *Chan. Ca.* 237. 1 *Chan. Ca.* 258. *S. P.*

6. A Plea of Outlawry need not be upon Oath. 1 *Chan. Ca.* 237. 1 *Chan. Ca.* 258. *S. P.* But *Quære.*

7. For where the Defendant pleaded the Privilege of the Exchequer, being the *Foreign* Oppoſer, the Plea was over-ruled, becauſe it was not put in upon Oath. Between *Gibſon* and *Whiteacre*, 2 *Vern.* 83. So a Plea of Outlawry was diſallowed, becauſe it was not put in upon Oath. 2 *Vern.* 37.

8. There was a Reference to the *Six Clerk*, whether a Plea of Outlawry, with an Averment of the ſame Perſon, ought to be upon Oath; and it was urged, that it had been ſo ruled in Lord *North*'s Time, becauſe it might come from the other Side, to aver that he was not the ſame Perſon; and the Court allowed the Plea to be good, being only the common Averment, but gave Leave to amend on Payment of 20*s.* Coſts. Between *Took* and *Took*, 2 *Vern.* 198.

9. A Plea of a former Suit depending for the ſame Matter, need not be upon Oath. 1 *Vern.* 332.

10. Where a Perſon is arreſted upon an Attachment, the Contempt ſhall hold good, though no Affidavit be filed at the Time of Taking forth the Attachment, if it be filed before the Return of it. 1 *Vern.* 172.

## (B) Where an Affidavit may be ſaid to be full and ſufficient, and what ſhall be allowed thereon.

1. DEclared by my Lord *Chancellor Jefferies*, that a general Affidavit of having material Witneſſes beyond Sea ſhould not be ſufficient, but the Witneſſes muſt be named in the Affidavit, and the Point mentioned to which they can materially depoſe. 1 *Vern.* 334.

2. Some Bailiffs, who had ſerved an Execution in Breach of an Injunction, find Money hid in the Houſe, and carry it away, and the Party, at whoſe Suit the Execution was taken out, was ordered to make Satisfaction, who complained of this Order as unjuſt, ſaying, that the Parties ſhould be admitted to purge themſelves by Oath; and that the Plaintiff ſhould not be admitted to be Judge of his own Damages; but my *Lord Chancellor* confirmed the Order, and ſaid, That a Man who had ſtolen would not ſtick to forſwear it; and that therefore *in Odium ſpoliatoris*, the Oath of the Party injured ſhould be a good Charge on him who did the Wrong. Between *Childrens* and *Saxby*, 25 *Car.* 2. 1 *Vern.* 207.

3. An Accountant ſhall be allowed Sums under forty Shillings on his own Affidavit. 1 *Vern.* 283. *But for this* vide *Title* Account *Letter* (B).

## CAP.

# CAP. IV.

# Agreements, Articles, and Covenants.

(A) Agreements and Covenants which ought to be performed in Specie, & econt'.

(B) Parol Agreements, or such as are within the Statute of Frauds and Perjuries, & econt'.

(C) Voluntary Agreements, in what Cases to be performed.

(D) Agreements, by whom to be performed.

(E) Concerning the Manner and Time of performing Agreements.

(F) Where the Person or Estate will be made liable to a Covenant or Agreement.

(G) Where there may be Relief when the Agreement is not strictly performed.

## (A) Agreements and Covenants which ought to be performed in Specie, & econt'.

1. IF an Uncle covenants, in Consideration of natural Love, and in order to gain a Reconciliation between his Nephew and his Father, (whom the Nephew had disobliged) to settle his Estate on his Nephew: Such Covenant shall be executed *in Specie*; tho' it be objected, that a Court of Equity cannot decree the Execution of a Covenant or Agreement *in Specie*, when the Party has a Remedy for Damages at (*a*) Law. Between *Wiseman* and *Roper*

(*a*) Prohibitions have formerly been granted to Inferior Courts of Equity, for decreeing the Performance of Agreements *in Specie*; as where a Man promised to make a Lease, and refusing, the Court of *Marches of Wales* decreed a Performance; and a Prohibition was granted. 1 *Roll. Abr.* 280. *Lat.* 172. 1 *Rol. Rep.* 368. But now the Power of Chancery, and other Courts of Equity, in inforcing the Execution of Articles and Agreements, is so well established, that in many Cases, Money agreed to be laid out in Lands shall be considered as



Lands,

*Roper*, 21 *Car.* 1. 1 *Chan. Rep.* 158. An Agreement decreed *in Specie*. 19 *Eliz. Cary* 84. and the like Objection made.

Lands, and Lands as Money; *vid.*

1 *Chan. Ca.* 39. and tho' a losing Bargain will sometimes be decreed as well as a Beneficial one, 2 *Vern.* 423. yet it must ever be observed, that Articles or Agreements, out of which an Equity can be raised for a Decree *in Specie*, ought to be obtained with all imaginable Fairness, and without any Mixture tending to Surprize or Circumvention; and that they be not extremely unreasonable in any Respect; otherwise a Court of Equity will, according to the Circumstance of the Case, either set the Agreement quite aside, send the Party to Law, or direct a Trial in a *Quantum damnificat'*.

2. *A.* having a Lease from the Dean and Chapter of——sells it to *B.* and it was agreed, that upon *A.*'s abating Part of the Money, *B.* should, upon the King and the Dean and Chapter's Restoration, reconvey it to *A.* and though it was objected, that this was in Nature of a Wager, and so more proper for a Common Law Court; yet a specifick Performance of the Agreement was decreed. 14 *Car.* 2. between *Parker* and *Palmer*, 1 *Chan. Ca.* 42.

3. *J. S.* upon a Treaty of Marriage, offered to settle 500 *l. per Annum* as a Jointure on his intended Wife, and was intrusted with the Drawing of the Settlement, which the Wife never read, and the Jointure settled was but 400 *l. per Annum*, and he taking Notice during the Marriage, that the Jointure settled was not so much, and talking of making of it up, but dying before, his Heir was decreed to make it up, altho' there was no (*b*) Covenant or Agreement proved, by which he bound himself to make a Jointure of that Value. *Mich.* 1681. between *Benson* and *Bellasis*, 1 *Vern.* 16.

(*b*) There needs no great Exactness in the Words which make a Covenant; for where it appears to be the Intent of Two to do, or not to do a Thing, it will be construed a Covenant, and the rather in Equity, where a Covenant is only considered as an Evidence of an Agreement, as a Bond may be. *Vide* 1 *Chan. Ca.* 294.

4. A Feme sole, being Tenant in Possession, agrees with the Heir at Law, who pretended a Title, that in Case he did not disturb her, she would leave him the Land after her Death, if she died without Issue of her Body, or 500 *l.* in Money; the Feme married, and devised to her Husband; and though it was urged, that this was all the Portion the Husband had with her, and that he was therefore *quasi* a Purchaser, and that she being Tenant in Tail, might have docked the Remainder, notwithstanding the Court decreed a Performance of the Agreement. *Pasch.* 1682. between *Guilmore* and *Battison*, 1 *Vern.* 48.

5. If *A.* upon the Marriage of his Brother, executes a Writing, by which he promises, if the Wife be worth 160 *l.* and if he dies without Issue, he will give his Lands to his Brother and his Heirs, and the Wife is worth 160 *l.* And *A.* himself afterwards marries and settles the Lands in Jointure upon his Wife, and dies without Issue, having devised the Lands to his Wife in Fee, though this is urged to be a Limitation to take Effect after a Dying without Issue, and so subject to be destroyed by the Tenant in Tail, yet as the Marriage was proved to be in Expectation of the Performance of this Agreement, it will be good against the Devisee of the Wife. Decreed 33 *Car.* 2. between *Goylmer* and *Paddiston*, 2 *Vent.* 353, 354.

6. The Plaintiff assigned some Shares of the Excise to the Defendant, who thereupon covenanted to save him harmless, and to stand in his Place touching all Payments to the King; the Plaintiff being sued by the King brought his Bill to have the Agreement performed *in Specie*, and altho' it was insisted that the Plaintiff might recover

Damages at Law; and that this was not a Covenant for any Thing certain; and that by this Means a Maſter in Chancery was to tax Damages inſtead of a Jury; yet it was decreed that the Defendant ſhould perform his Covenants; and it was directed to a Maſter, that as often as any Breach ſhould happen, he ſhould report it ſpecially, that the Court, if Occaſion ſhould be, might direct a Trial in a *Quantum Damnificat'*. *Mich.* 35 *Car.* 2. between Lord *Ranelaugh* and *Hayes*, 1 *Vern.* 189. 2 *Chan. Ca.* 146. *S. C.*

7. If *J. S.* a Jointreſs, brings her Bill to have an Account of the Real and Perſonal Eſtate of her late Husband, and to have Satisfaction thereout for a Defect of Value of her Jointure Lands, which he had covenanted to be and to continue of ſuch Value; and the Defendant inſiſts, that this is a Covenant which ſounds only in Damages, and properly determinable at Law; tho' it be admitted that a Court of Equity cannot regularly aſſeſs Damages; yet in this Caſe a Maſter in Chancery may properly inquire into the Value and Defect of the Lands, and report it to the Court, which may decree ſuch Defect to be made good, or ſend it to be tried at Law upon a *Quantum Damnificat'*. *Mich.* 1699. between *Hedges* and *Everard*.

8. The Condition of a Bond was to ſettle certain Lands in ſuch a Manor by ſuch a Day; the Obligor dies before the Day, ſo the Bond was ſaved at Law; and the Queſtion was, Whether this Court would decree an Execution *in Specie*: *Per* Lord *Chancellor*, the Lands muſt be ſettled, and ſo it has often been done. *Paſch.* 1697. between *Holtham* and *Ryland*.

9. By a Marriage-Agreement, which was reduced into Writing, but not ſealed, the Son's intended Wife was to have more than would have been left for the Father indebted, his Wife and two Daughters unpreferred; and the Court would not decree it, principally by Reaſon of the Extremity of it, but left the Party to his Remedy at Law. 31 *Car.* 2. *Anonymus*, 2 *Chan. Ca.* 17.

10. If *A.* Articles for the Purchaſe of *B.*'s Eſtate, pretending he bought it for one whom *B.* was willing to oblige, and thereby gets it ſomewhat the cheaper, when in Truth he bought it for another, Equity will not decree an Execution of this Agreement. *Hill.* 1682. between *Philips* and the *Duke* of *Bucks*, 1 *Vern.* 227.

11. *A.* on the Marriage of his Daughter to *B.* covenants that *B.* ſhall have his Lands called *C.* at his Death, cheaper than any other Perſon, and lives twenty Years after, and deviſes to *B.* 1000*l.* and to his Daughter, *B.*'s Wife, 500*l.* and deviſes the Lands to his Grandſon; the Court refuſed to decree an Execution of the Agreement, becauſe of the Uncertainty of it; and it not being mutual, *B.* not being bound to take it at any Price. *Hill.* 1700. between *Bromley* and *Jefferies*, 2 *Vern.* 16.

12. An Agreement for a Purchaſe being obtained by an Attorney from an old Woman of *Ninety*, and ſeveral ſuſpicious Circumſtances appearing, the Court would neither decree it to be carried into Execution againſt the Heir at Law, nor to be delivered up upon a Croſs Bill exhibited for that Purpoſe. *Hill.* 1708. between *Green* and *Wood*, 2 *Vern.* 632.

## (B) Parol Agreements, or such as are within the Statute of Frauds and Perjuries, & econt'.

1. A Bill was brought to have the Execution of a Parol Agreement for a Leaſe of a Houſe, ſetting forth, that the Plaintiff, in Confidence of this Agreement, had expended large Sums of Money in Repairs, *&c.* to which the Defendant pleaded the (*a*) Statute of *Frauds and Perjuries*, and the Plea was allowed. But my Lord Keeper was of Opinion, that if it had been laid in the Bill to be Part of the Agreement, that it ſhould be put into Writing, it might have altered the Caſe, and poſſibly require an Anſwer. *Hill.* 1682. between *Hollis* and *Whiting*, 1 *Vern.* 151.

(*a*) By the 29 *Car.* 2. *c.* 3. All Eſtates, Intereſts of Freehold, or Terms for Years, or any uncertain Intereſt in or out of Lands, *&c.* not put in Writing and ſigned by the Parties making them, or their Agents authorized by Writing, ſhall have no greater Effect than as Eſtates at Will, except Leaſes not exceeding three Years, from the Making whereof the Rent reſerved ſhall be two Thirds of the full Value of the Thing demiſed.

2. A Bill being afterwards brought in the precedent Caſe, in which it was alledged, that it was Part of the Agreement, that it ſhould be reduced into Writing; My Lord *Keeper* ſaid, that the Difficulty was, that the Act makes void the Eſtate, but does not ſay that the Agreement itſelf ſhall be void, and therefore he thought, that if that ſubſiſted, ſo as to intitle the Party to Damages at Law, it might be (*b*) decreed in Equity, and directed that Point to be tried, and that afterwards he would conſider farther of it; but as to the Improvements made, his Lordſhip was clear of Opinion, that for ſuch as were for Uſe and Neceſſity, and not meerly for Humour and Fancy, the Party was to have Satisfaction. 1 *Vern.* 159.

(*b*) As the Statute of Frauds and Perjuries was made with a Deſign to prevent, either in Marriage, or any other Treaties, Incertainty, Perjury, or Contrariety of Evidence, ſeveral Caſes not liable to theſe Inconveniences have been determined to be out of the Statute, upon the following Diſtinctions, which ſeem the more neceſſary to be mentioned, as many of the printed Caſes on this Subject take no Notice of them; and by not giving us all the Circumſtances of the Caſe, frequently contradict each other; it may likewiſe be proper to inſert the Caſes themſelves, which ſupport theſe Diſtinctions.

3. 1*ſt*, *That tho' the Agreement be by Parol, and in no Part executed, yet if there be no Incertainty, the Court will decree it:* As if a Bill be brought for a Specifick Performance of an Agreement, and the Subſtance of the Agreement is ſet forth in the Bill, and confeſſed by the Defendant's Anſwer, the Court will decree Execution of it; for in this Caſe there is no Danger of Perjury, which was the only Thing the Statute intended to prevent. *Mich.* 1702. between *Croyſton* and *Banes*, *Mich.* 1713. Like Point between *Simondſon* and *Tweed*.

4. 2*dly*, *That tho' the Agreement be by Parol; yet if it be agreed to be reduced into Writing, and Part of the Agreement is executed, but the Reducing of it into Writing is prevented by Fraud, it may be good.* As if upon a Marriage-Treaty, Inſtructions are given by the Husband to draw a Settlement, and by him privately countermanded, and afterwards he draws in the Woman, by Perſuaſions and Aſſurances of ſuch Settlement, to marry him, this ſhall be executed. *Mich.* 1719. Sir *George Maxwell* and *Lady Montacute*'s Caſe.

5. So

5. So where a Parol Agreement was concerning the Lending of Money on a Mortgage, and the Conveyance propoſed was an abſolute Deed from the Mortgagor, and a Deed of Defeaſance from the Mortgagee; and after the Mortgagee had got the Deed of Conveyance, he refuſed to execute the Defeaſance; yet it was decreed againſt him on the Fraud, by Lord *Nottingham*, ſoon after the Making the Statute, a Caſe quoted and agreed to, in Sir *George Maxwell*'s Caſe, *Mich.* 1719.

6. 3*dly*, *When the Agreement is ſigned but by one Party, yet it may be decreed on the Circumſtances of Fraud*; as where the Defendant, on a Treaty of Marriage for his Daughter with the Plaintiff, ſigned a Writing comprizing the Terms of the Agreement; and afterwards deſigning to elude the Force thereof, and get looſe from his Agreement, ordered his Daughter to put on a good Humour, and get the Plaintiff to deliver up that Writing, and then marry him, which ſhe accordingly did; and the Defendant ſtood by at a Corner of a Street to ſee them go by to be married; and the Plaintiff was relieved by the Maſter of the Rolls upon the Point of Fraud, which was proved. Cited to be adjudged by my Lord *Chancellor* in the Caſe of *Bawdes* and *Amhurſt*, *Paſch.* 1715. Between *Mallet* and *Halfpenny*, 2 *Vern.* 373. *S. C.* reported by the Name of *Halfpenny* and *Ballet*; but no Mention made of any Fraud, but that the Father was privy and conſented.

7. The Defendant's Son made his Addreſſes to the Plaintiff's Daughter, and the Plaintiff deſiring to know what the Father could ſettle on him, he told him, that his Father had an Eſtate of 60*l.* *per Ann.* that he was in a good Trade, and would take him in Partner; and ſaid he would ſatisfy him more particularly by going to his Father, who lived at ſome Diſtance off, and accordingly went, and on his Return told him, that he would ſettle the Eſtate on him, and take him in Partner; upon which the Plaintiff agreed to ſettle a Leaſehold Eſtate on him of 2 or 300*l.* *per Annum*; but deſired the Son to acquaint his Father of it by Letter, who did, and the Father, in his Anſwer, expreſſed his Good-liking of the Match, and ſaid he would comply with every Thing he told his Son. On the Marriage-Day the Woman fell ſick of the Small-Pox, and the ſame Day the Son went to his Father's, where he fell ſick likewiſe of the Small-Pox, but in his Sickneſs was prevailed on to make a Will, and deviſe the Leaſehold Eſtate to his Father, and died; the Wife recovering, her Father and ſhe pray a Reconveyance of the Leaſehold Eſtate, or that the Agreement might be performed *in Specie*, and a Diſcovery of the Letter wrote by the Son, and inſiſted, that the Letter and Anſwer brought the Agreement out of the Statute of Frauds; but the Defendant denying that he knew the Contents of the Letter, tho' he owned he received ſuch a one, and that he had burnt it as Waſte-Paper, my *Lord* Chancellor (tho' he ſaid it was a Caſe of great Compaſſion) doubted whether he could relieve the Plaintiffs, ſaying, it was only executed according to the Statute, by one Party, and what the Defendant told his Son might be very uncertain, who perhaps might have magnified Matters, in order to inhance his Father-in-Law's good Eſteem of him; but he gave the Parties Time to ſee if they could agree the Matter. *Hill.* 1710. between *Hall* and *Butler*.

8. On a Marriage-Treaty, the Lady's Father propoſed to give 4500 *l.* Portion, and the Husband was to ſettle 4 or 500 *l. per Annum* for a Jointure; the Father and intended Husband went to Mr. *Minſhull*'s Chambers, who hearing the Propoſals on both Sides, took down Minutes or Heads thereof in Writing; and the ſame Day gave them to his Clerk, to draw a Settlement according to the Terms of the Agreement; the next Day the Father fell ſick ſuddenly, and died in two Hours after, and the next Morning the Marriage was conſummated; and on a Bill brought to have a Specifick Performance of the Agreement, my Lord *Chancellor* decreed it to be within the Statute of *Frauds*, and ſaid, he knew no Caſe where an Agreement, tho' wrote by the Party himſelf, ſhould bind, if not ſigned, or in Part executed by him; and that thoſe preparatory Heads might have received ſeveral Alterations or Additions, or the Agreement might have entirely broke off upon ſome further Inquiry of the Party's Circumſtances; and this Decree was thought very juſt by the Bar, who all agreed with my Lord Chancellor, that if the Marriage had been had upon the Foot of this Writing, and the Father had been privy and conſenting to it, that he ſhould afterwards have been obliged to execute his Part thereof. *Paſch.* 1715. between *Bawdes* and *Amhurſt*.

9. If *A.* agrees to ſell the Lands in Queſtion to *B.* and a ſhort Note is drawn of the Agreement, (but not ſigned by either Party) purporting, among other Things, that *B.* ſhould have the Lands from *Lady-day* next, and that he ſhould then pay the Purchaſe-Money, and Poſſeſſion is delivered *B.* who thereupon puts in his Cattle, and makes Incroachments on *A.*'s other Lands, by which ſome Differences aroſe, which to remove, *A.* deſires *B.* to repeal the Bargain, which he refuſed; upon which *A.* ſells the Lands to *C.* who had Notice; *B.* having tendered the Money and Conveyances the 26th of *March* following, he will be decreed the Lands; this Agreement being in Part executed, and therefore not within the Statute. *Hill.* 1685. between *Butcher* and *Stapely*, 1 *Vern.* 363. 2 *Vern.* 455. *S. C.* cited in a Caſe where an Agreement, tho' not ſigned, yet being in Part executed, was decreed between *Pyke* and *Williams*.

10. *A.* ſold Houſes to *B.* for 2000 *l.* a Note was made by *A.* of the Agreement, and ſigned by *B.* only; and it was objected, that this was within the Statute, and that the Note binds not him who did not ſign it; and that they muſt be both or neither bound in Equity; but it was decreed that they were both bound. 36 *Car.* 2. between *Hatton* and *Gray*, 2 *Chan. Ca.* 164.

11. *A.* agreed by Parol with *B.* for a Leaſe, which was drawn, peruſed, and corrected by *A.*'s Counſel, and afterwards engroſſed; *B.* ſigned the Leaſe, *A.* having pleaded the Statute: The Court ordered him to Anſwer, but ſaved the Benefit of the Plea till the Hearing. *Hill.* 1683. between *Lowther* and *Carril*, 1 *Vern.* 221.

12. An Adminiſtratrix, and her two Children, being entitled to a Leaſe of a Houſe, they all agree to make a Leaſe to *J. S.* for ten Years, and the Adminiſtratrix alone, with the Privity of the other Two, executes the Leaſe; and it was held, that this was out of the Statute, and the Leaſe good. *Mich.* 1683. between *Heighter* and *Sturman*, 1 *Vern.* 210.

13. *A.* and *B.* being joint Leſſees of a Building-Leaſe, *A.* by Parol agrees to ſell his Intereſt to *B.* for four Guineas, and accepts a Pair of Compaſſes in Hand to bind the Bargain; *A.* having pleaded the Statute of *Frauds*, the Court ordered him to Anſwer the Agreement, being in Part executed, but ſaved the Benefit of the Plea to the Hearing. *Mich.* 1687. between *Alſopp* and *Patten*, 1 *Vern.* 472, 473.

14. But where *A.* and *B.* being ſeverally in Treaty to purchaſe Houſe and Toft of Ground of *J. S.* they agree by Parol, that *A.* ſhall deſiſt, and that *B.* ſhall Purchaſe and let *A.* have Part of the Ground, which he wanted, at a proportionable Price; *B.* purchaſes, but refuſes to perform the Agreement; and it was held by the Maſter of the Rolls, that this was out of the Statute, being in Part executed by *A.*'s Deſiſting; but upon an Appeal my Lord Chancellor held it within the Proviſion of the Act, and reverſed the Decree. *Mich.* 1708. between *Lamas* and *Bayly*, 2 *Vern.* 627.

15. The ſingle Point of a Caſe was, whether an Agreement in Writing could be diſcharged by Parol; and the Lord Keeper *North* held it might, and diſmiſſed the Bill, which was brought to have it executed *in Specie*. *Paſch.* 1684. between *Gorman* and *Salisbury*, 1 *Vern.* 240.

16. *A.* wrote a Letter, ſignifying his Aſſent to the Marriage of his Daughter with *J. S.* and that he would give her 1500 *l.* and afterwards, by another Letter, upon a further Treaty concerning the Marriage, he went back from the Propoſals of his firſt Letter; but in ſome Time after declared that he would agree to what was propoſed in his firſt Letter. This Letter was held a ſufficient Promiſe in Writing, and not within the (*c*) Statute of Frauds and Perjuries, 35 *Car.* 2. between *Bird* and *Bloſſe*, 2 *Vent.* 361. and that the laſt Declaration had ſet up the Terms of the firſt Letter again; *vide* 1 *Vern.* 110. a Letter wrote by a Father, promiſing a Portion, and he conſenting, held out of the Statute.

(*c*) By the 29 *Car.* 2. *cap.* 3. No Action ſhall be brought to charge any Perſon on any Agreement or Conſideration of a Marriage, unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome *Memorandum* or Note thereof, ſhall be in Writing, ſigned by the Party to be charged therewith, or ſome other Perſon authorized by him.

17. On a Bill for a Marriage-Portion, the chief Evidence to ſupport it, was a Letter proved to have been written by the Father's Direction, wherein it was ſaid he would give 1500 *l.* Portion with his Daughter, and that he was afterwards privy to the Marriage, and ſeemed to approve of it; and the Portion was decreed the Huſband, who had taken out Adminiſtration to his Wife; and this Decree affirmed in the Houſe of Lords. *Mich.* 1694. between *Wankford* and *Fotherby*, 2 *Vern.* 322.

18. On a Treaty of Marriage between the Plaintiff and the Defendant's Daughter, a Meeting was appointed, and an Agreement drawn up in Writing, but ſigned by neither Party; and the Defendant ſwore, that tho' it was drawn up in Writing, yet upon ſome Diſputes and Difficulties ariſing afterwards it broke off; but one Witneſs ſwore, that after it was writ, it was read to the Parties, and approved of by them; afterwards the Plaintiff married the Defendant's Daughter, with his Conſent and Privity, who ſeemed ſo well pleaſed, that he helped to ſet them forward in the Morning, and entertained them at his Houſe; and he was decreed to perform

the Agreement. *Hill.* 1690. between *Cookes* and *Maſeall*, 2 *Vern.* 200.

19. But where *A.* by Letter under his Hand promiſed 1000 *l.* to his Niece, but in the ſame Letter diſſuaded her from marrying the Plaintiff, but afterwards was preſent at, and gave her in Marriage; yet the Court would not decree the Payment of the 1000*l.* but left the Plaintiff to his Action at Law. *Hill.* 1690. between *Douglas* and *Vincent*, 2 *Vern.* 202.

20. *A.* and *B.* agree, that *B.* ſhall aſſign a Term for Years in his Houſe and Plate, and certain Veſſels of Beer, for 200 *Guineas*, whereof one was paid in Hand as Earneſt of the Bargain, and three Days after 19 *Guineas* more; and Part of the Agreement was, that it ſhould be executed by Writing at a certain Time: Upon a Bill for a Specifick Performance of the Agreement *B.* pleaded the (*d*) Statute of Frauds and Perjuries, and inſiſted, that no Part of the Things being delivered, there was no Execution, and that the twenty *Guineas* were delivered for the Leaſe; but the Lord Keeper over-ruled the Plea. *Hill.* 34 *Car.* 2. between *Leak* and *Morrice*, 2 *Chan. Ca.* 135.

(*d*) By the 29 *Car.* 2. *cap* 3. no Contract for the Sale of Goods, for ten Pounds or upwards, ſhall be good, except the Buyer actually receives Part of the Goods ſold, or gives ſomething in Earneſt to bind the Bargain, or in Part of Payment, or ſome Note thereof in Writing be made and ſigned by the Party to be charged with the Contract, or their Agents thereunto lawfully authorized; and no Action is to be brought upon any Agreement, that is not to be performed within the Space of a Year from the making the ſaid Agreement, unleſs the Agreement upon which ſuch Action ſhall be brought ſhall be put in Writing, and ſigned by the Party to be charged therewith.

## (C) Voluntary Agreements, in what Caſes to be perfozmed.

1. IF there are two (*a*) Voluntary Deeds or Conveyances of the ſame Eſtate, the firſt ſhall prevail. 1 *Chan. Rep.* 173.

(*a*) Tho' Voluntary Agreements and Conveyances are regularly good, ſo as to bind the Parties themſelves, if they are not attended with Badges of Fraud or Circumvention; yet it has been always held Diſcretionary in Courts of Equity, whether they would interpoſe, either in aiding or ſetting them aſide; but if they affect Creditors, Purchaſers, or even younger Children, a Court of Equity will interpoſe.

2. If *A.* makes a Voluntary Settlement of his Eſtate, without any Power of Revocation, and afterwards deviſes it, the Deviſee being a Volunteer, ſhall have no Aid againſt the Settlement; for to relieve in ſuch a Caſe, would be to eſtabliſh it as a Maxim, *That no Man can make any Voluntary Diſpoſition of his Eſtate, but by his Will only*, which would be abſurd. *Mich.* 1682. between *Villars* and *Beamont*, 1 *Vern.* 100, 101.

3. So where *A.* conveyed his Lands to the Uſe of himſelf for Life, Remainder, as to a third Part, to his Wife for a Jointure, Remainder of the Whole to his Infant Heir in Tail, and two Days afterwards makes his Will, and deviſes the ſame Eſtate with other Things, to his Infant Heir in Tail, but ſubject to the Payment of Debts, in Caſe his Perſonal Eſtate ſhould not be ſufficient, and alſo a Legacy of 250 *l.* the Perſonal Eſtate proving deficient, on a Bill brought to have the Debts paid out of the Lands, that the Legacy may be charged on the Perſonal Eſtate, it was held by the Court, that the Settlement, tho' voluntary, yet it was not revocable, and therefore the Teſtator was diſabled to charge the Lands by his Will. *Trin.* 1687. between *Bale* and *Newton*, 1 *Vern.* 464.

4. *A.*

4. *A.* ſeiſed in Tail of Freehold Lands, and in Fee of Copyhold Lands, deviſed the Copyhold Lands to the Defendant, who was intitled to the Remainder of the Freehold Lands, and deviſed the Freehold Lands to the Plaintiff; the Defendant apprehending there had been a Recovery ſuffered by the Teſtator, agreed with the Plaintiff, without any Conſideration, that each of them ſhould enjoy the Lands according to the Will; but diſcovering afterwards that there had been no Recovery ſuffered, he brought his Action to recover his Freehold Lands; and the Plaintiff brought a Bill to eſtabliſh the Agreement; which was decreed accordingly. Between *Frank* and *Frank*, 1 *Chan. Ca.* 84.

5. If a Man makes a Voluntary Conveyance, and there be a Defect in it, ſo as it cannot operate at Law, Equity will not decree an Execution thereof; but in ſome Caſes it will be decreed, if intended as a Proviſion for younger Children. 2 *Vent.* 365. 2 *Vern.* 40. *S. P.*

6. A Father makes a Voluntary Settlement on his eldeſt Son and his Heirs, without any Power of Revocation; afterwards he makes a Settlement on his ſecond Son for Life, with Remainder to his firſt and other Sons in Tail, and dies; the firſt Deed came to the Hands of the eldeſt Son's Heir, and the other to the ſecond Son, who brought a Bill to ſet aſide the firſt; but both Sons having been otherwiſe provided for, it was held by my Lord Chancellor, that tho' both Deeds were Voluntary, yet the Conſideration of being a younger Child was not ſufficient to ſet aſide the firſt. Between *Clavering* and *Clavering*, *Hill.* 1704. *vide* 2 *Vern. S.C.* 475. differently ſtated, and ſeveral Caſes there put to this Purpoſe.

7. If an Annuity is granted by one to his Houſe-keeper, with a Bond for Payment of it, and the Bond is loſt, Equity will decree Payment of the Annuity, for Service is a Conſideration, and no *Turpis contractus* ſhall be preſumed, unleſs proved. Between *Lightbone* and *Weeden*, *Hill.* 1700.

## (D) Agreements, by whom to be performed.

1. IF *A.* by Writing, agrees with *B.* and *C.* to pave the Streets in a Pariſh, and they, in Behalf of the Pariſh, agree to pay him for it, and this Writing is lodged in the Hands of *B.* if *A.* paves the Streets, he muſt have Relief againſt the Undertakers, eſpecially in this Caſe; the written Agreement, which is his Evidence, being in the Hands of one of them; and the Undertakers muſt take their Remedy againſt the Reſt of the Pariſh. *Mich.* 13 *Car.* 2. between *Meriel* and *Wymondſal*, *Hard.* 205.

2. If fifteen of the Tenants of a Manor agree to incloſe a Common, and it appears that there are eighteen who have Right of Commonage; yet an Incloſure will be decreed, tho' oppoſed by Three, for it ſhall not be in the Power of two or three wilful Perſons to oppoſe a Publick Good. 3 *Chan. Rep.* 13, 14.

3. So if the Agreement be to ſtint a Common, it ſhall be decreed, tho' oppoſed by two or three humourſome Tenants, 2 *Vern.* 103. where it is ſaid, that a Stint is more to be favoured than an Incloſure.

4. If Tenant in Tail, for valuable Conſideration, agrees to convey, he may be compelled in Equity to execute the Agreement; but if he dies, his Iſſue is not bound thereby, unleſs he doth ſome Act whereby he conſents to and confirms the Agreement. 1 *Chanc. Ca.* 171. 1 *Lev.* 239. *S. P.* Tho' there was a Decree, and the Father ſtood out all the Proceſſes of Contempt. Between *Powel* and *Powel*, *Hill.* 1708. ſo tho' the Father died in Priſon, and in Contempt for not performing the Decree, yet the Iſſue was not bound. 2 *Vern.* 306. But for this, *vide* by what Acts of the Anceſtor ſhall the Heir be bound, Title **Heir.**

5. If a Copyholder for Life, where by the Cuſtom there is a Widow's Eſtate, agrees to ſell, and dies; his Widow is no more bound by the Agreement, than one Jointenant is by an Agreement to ſell by the other. *Paſch.* 1688. between *Muſgrave* and *Daſhwood*, 2 *Vern.* 63.

6. If a Feme Covert by Agreement made with her Husband is to ſurrender or levy a Fine, though the Husband die before it be done, the Court will by Decree compel the Woman to perform the Agreement. Between *Baker* and *Child*, 2 *Vern.* 61.

7. The Plaintiff's Father applied himſelf to the Defendant *H.* a Scrivener, to borrow 200 *l.* who accordingly procured the Money, and the Plaintiff and his Father entered into Bonds for the Payment of it to *B.* and *C.* the Plaintiff's Father became afterwards inſolvent, and he himſelf alſo, by Reaſon of the Debts for which he ſtood ingaged for his Father: The Father having compounded with his other Creditors for ſeven Shillings in the Pound, the Plaintiff and his Father applied themſelves to the Defendant, to know where *B.* and *C.* lived, who, inſtead of informing them, told them that they would ſtand to any Thing he did; upon which they compounded with him for 10 *s.* in the Pound, 70 *l.* to be paid immediately, which was done, and 30 *l.* at a Day afterwards, which was tendered; and now the Plaintiff prays that the Bonds may be cancelled, and that he may be indemnified; and it was decreed that the Plaintiff ſhould pay *B.* and *C.* their whole Money, they not being privy to the Agreement, and that *H.* tho' he acted as an Agent ſhould repay him, and indemnify him, according to the Agreement. *Hill.* 1690. between *Parrot* and *Wells*, 2 *Vern.* 127.

8. If *A.* articles on Behalf of *B.* to purchaſe four Houſes in *Jamaica*, and to pay 800 *l.* for the ſame, and pending a Suit to compel the Seller to make out a good Title, the Houſes are ſwallowed up by an Earthquake, yet *A.* ſhall pay the 800 *l.* tho' he has not ſufficient Effects of *B.*'s in his Hands. Decreed, and affirmed in the Houſe of Lords, between *Caſs* and *Rudell*, 2 *Vern.* 280.

## (E) Concerning the Manner and Time of performing Agreements.

1. IF an Agreement be to quit the Poſſeſſion of Lands, the Court will not decree a Conveyance of the Lands themſelves; but if the Agreement was to convey Lands, the Court would have decreed the Agreement, tho' the Party was not appriſed what Eſtate he had in the Lands. Lord Keeper, *Hill.* 1682, between *Gerard* and *Vaux*, 1 *Vern.* 121.

2. If a Bill be brought to have a Covenant decreed *in Specie*, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of black Stone, and that when the old one failed, he might ſink a new Pit; and with a farther Covenant, that there ſhould be no other Pit there; and it appears in the Cauſe, that the Defendant, and thoſe under whom he claims, had been in Poſſeſſion of a Pit there, and had uſed the ſame for above ſixty Years paſt; the Court, inſtead of Decreeing the Covenant *in Specie*, will diſmiſs the Bill. *Hill.* 1690. between *Scolefield* and *Whitehead*, 2 *Vern.* 127.

3. If *A.* articles to ſell Lands to *B.* (who was his Agent, and greatly intruſted by him in the Management of his Eſtate) for 15000 *l.* the whole Money to be paid, or ſo much Land returned as would make up what he paid ſhort of the 15000 *l.* and *A.* conveys Part of the Lands to *B.* and by his Perſuaſion values that Part at an Undervalue, alledging it was not material to mention the very Sum, in Regard he was to make up the whole 15000 *l.* and then *B.* ſells this Part to *C.* and then would have returned ſo much of the Reſt as would make up the 15000 *l.* tho' the Sale to *C.* ſhall ſtand, yet the Articles ſhall be ſet aſide as unreaſonable; and the rather, becauſe *B.* had not paid the Money, or returned the Value in Lands, according to the Time prefixed. Decreed, and affirmed in the Houſe of Lords. *Mich.* 1690. between *Broom Whorwood* and *Simpſon*, 2 *Vern.* 186.

4. If one is bound to transfer 300 *l.* *Eaſt-India* Stock before ſuch a Time, which he neglects to do, and the Stock is much riſen, he ſhall be obliged to transfer the Stock *in Specie*, and account for all Dividends from the Time that it ought to have been transferred. *Mich.* 1700. between *Gardner* and *Pullen*, 2 *Vern.* 394.

5. If *A.* covenants on his Marriage to purchaſe Lands of 200 *l.* a Year, and ſettle them for the Jointure of his Wife, and to the firſt, *&c.* Sons of the Marriage; and he purchaſes Lands of that Value, but makes no Settlement; and on his Death the Lands deſcend on his eldeſt Son; if the Son brings a Bill for a Specifick Performance of the Agreement, the Lands deſcended will be decreed a Satisfaction of the Covenant. *Trin.* 1706. between *Wilcocks* and *Wilcocks*, 2 *Vern.* 558.

## (F) Where the Perſon or Eſtate will be made liable to a Covenant or Agreement.

1. IF a Man hath Lands ſubject to the Payment of a Rent-Charge, and grants Part of the Lands to *B.* and covenants that that Part ſhould be diſcharged of the Rent; yet this is not ſuch a Real Covenant, that ſhall run with the Land, and charge the other Lands with the whole; but it is only a Perſonal Covenant which muſt charge the Heir only in Reſpect of Aſſets. *Mich.* 1656. between *Cook* and *Arundel*, *Hard.* 87. decreed *in Scaccario*, 1 *Chanc. Ca.* 212. Like Point decreed *cont'*.

2. A Purchaſer of the Crown-Lands, in the Time of the late Wars, ſells Part to the Plaintiff, and covenants to make further Aſſurance, and he on the King's Reſtoration had a Leaſe for Years made to him under the King's Title; and he was decreed to aſſign his Term in the Part he ſold. *Hill.* 27 *Car.* 2. between *Taylor* and *Debar*, 1 *Chan. Ca.* 274. 2 *Chan. Ca.* 212. *S. C.*

3. If a Man covenants to ſettle Lands, or an Annuity out of Lands, and he afterwards purchaſes Lands, having no Lands before, and deviſes it, and dies, this purchaſed Land ſhall, notwithſtanding, be liable to the Covenant. *Paſch.* 1689. between *Tooke* and *Haſtings*, 2 *Vern.* 97.

4. *A.* and *K.* his Wife being ſeiſed in Right of the ſaid *K.* of two Pieces of Ground, by Indenture, 25 *January* 1622. did grant a Watercourſe to one *J. H.* and his Heirs, through the ſaid two Pieces of Ground; and by the Deed did covenant for them, their Heirs and Aſſigns, from Time to Time, to cleanſe the ſame, and that all Fines and Recoveries levied and ſuffered, or to be levied or ſuffered of the ſaid Grounds, ſhould be and enure to the Strengthening and Confirming the ſaid Watercourſe, according to the ſaid Grant; and afterwards a Recovery was had, and a Deed executed, declaring the Uſes to be as aforeſaid; the Watercourſe by meſne Aſſignments came to the Plaintiff, and the ſaid two Pieces of Ground to the Defendant, who built on the ſame, and much heightened the Ground which lay over the ſaid Watercourſe, and made it much more chargeable and inconvenient to repair; and as it was alledged (and in Part proved) the Building had much obſtructed the ſaid Watercourſe; ſo the Bill was for eſtabliſhing the Enjoyment of the ſaid Watercourſe, and that the Defendant, and all claiming under him, might from Time to Time cleanſe the ſame, according to the Covenant: 'Twas objected, that the ſaid Covenant being a Perſonal Covenant, was not at all ſtrengthened by the Recovery, and that the Plaintiff, and thoſe under whom he claimed, being ſenſible of it, had for forty Years cleanſed the ſame at their own Charges: But the Court was of Opinion, that this was a Covenant which run with the Land, and made good by the Recovery; and that tho' the Plaintiff had cleanſed the ſame at his own Charge, whilſt it was eaſy to be done, and of little Charge; yet ſince the Right was plain upon the Deed, and the Cleanſing made chargeable by the Building, it was reaſonable the Defendant ſhould do it; and decreed accordingly, and gave the Plaintiff his Coſts. *Hill.* 1691. between *Holmes* and *Buckley*.

## (G) Where there may be Relief when the Agreement is not ſtrictly performed.

1. *J. S.* having purchaſed Church-Lands in Fee, under the Title of the Uſurper, ſold the ſame to the Defendant's Teſtator, and covenanted that he was lawfully ſeiſed, *&c.* the Church being reſtored, and the Eſtate made void, *J. S.* was relieved againſt this Covenant; there being ſome Proof, that at the Time of Sealing, the Plaintiff, *J. S.* declared he undertook for his own Act only. *Mich.* 14 *Car.* 2. between Dr. *Caldcot* and *Hill*, 1 *Chanc. Ca.* 15. and a like Caſe ſaid to have been decreed about ſix Months before.

2. *A.* ſells to *B.* with Covenants only againſt *A.* and all claiming by, from or under him; *B.* ſecured the Purchaſe-Money; but before the Payment the Land was evicted, but not by any Title under *A.* but by a Title Paramount; *B.* ſued to be relieved, that he might not be forced to pay, ſeeing the Land was loſt, and was relieved. *Anonymus*, 31 *Car.* 2. *Chanc. Ca.* 19. reported *ex relatione Churchill.*

3. If

3. If a Creditor agrees with his Debtor to take leſs than his Debt, ſo that it be paid preciſely at ſuch a Day, and the Debtor fails of Payment, he cannot be relieved; for *per* Lord Keeper, *Cujus eſt dare ejus eſt diſponere. Mich.* 1683. between *Sewel* and *Muſſon*, 1 *Vern* 210. 1 *Chanc. Ca.* 110. *S. P. arguendo.*

4. If Money be lent on a Mortgage at 5 *per Cent.* and the Mortgagor covenants to pay 6 *per Cent.* if he made Default for the Space of ſixty Days after the Time of Payment; if he makes Default, the Court will not relieve, this being the Agreement of the Parties. *Hill.* 1690. between Lord *Halliſax* and *Higgins*, 2 *Vern.* 134.

5. If a Leſſee for a long Term of Years covenants to lay out 200 *l.* upon the Premiſſes, within the firſt ten Years, and lays out but 30 *l.* and after thirty Years of the Leaſe are expired, the Leſſor brings an Action of Covenant, and recovers 150 *l.* Damages, Equity will neither relieve againſt the Damage, nor decree the Money to be now laid out in Improvements; for *per* Lord Chancellor, tho' the Damages ſeem exceſſive, yet the Jury were proper Judges; and to decree it to be laid out now the Leaſe is almoſt expired, is not proper, for it is probable the Leſſee would not be ſo careful in laying it out in laſting Improvements, as he would be, were it laid out at firſt. *Paſch.* 1685. between *Barker* and *Holder*, 1 *Ven.* 316, 317.

6. If *A.* agrees with *B.* to purchaſe a Copyhold for two Lives, and pays 200 *l.* in Part, and is to pay the Remainder in three Months, and then to name his Lives, and take up his Copy; a Court is held, and the three Months expire, and *B.* dies ſuddenly, and the Manor comes to one who is not bound by the Agreement; the Executor of *B.* will be decreed to repay the Money, altho' it is inſiſted, that it was *A.*'s own Laches, that he did not take up his Copy. *Mich.* 1687. decreed between *Awbry* and *Keen*, 1 *Vern.* 472.

7. *A.* intruſted by *B.* to receive Intereſt on Tallies, receives the Principal and fails, and afterwards compounds with his Creditors, but *B.* would not come in without having a greater Compoſition, which *A.* agrees to give; *A.* brings a Bill to be relieved againſt this underhand Agreement; but he having been guilty of a great Fraud and Breach of Truſt, and he by the ſaid Agreement having promiſed to make ſome Satisfaction, it was held that he was not intitled to any Relief. *Hill.* 1707. between *Small* and *Brachley* 2 *Vern.* 602.

CAP.

# CAP. V.

# Amendment.

## (A) In what Cases to be allowed.

1. A Bill may be (*a*) amended where there are not proper Parties made Defendants to the Suit. 3 *Chanc. Rep.* 92.

(*a*) If there be any Overſight or Miſtake in the Bill, which requires Amendment before the Defendant's Appearance, it may be amended upon Motion, without paying Coſts; but if it be amended after Appearance, Coſts muſt be paid: The Coſts upon a Demurrer, put in for a Slip or Miſtake, are twenty Shillings, which being paid, the Party may amend without Motion; but if any new Matters ariſe after the Cauſe is at Iſſue, which is neceſſary for the Plaintiff to ſet forth, this is regularly done by Filing *a Supplemental Bill*, which the Court will admit upon Motion and Affidavit of ſuch new Matter.

2. So where ſome Tenants of a Manor brought a Bill againſt the Lord, to eſtabliſh certain Cuſtoms; and he demurred, becauſe all the Tenanrs were not made Parties, either as Plaintiffs or Defendants; and the Court gave them Leave to amend their Bill, and to add as many more Plaintiffs as would give them Letters of Attorney ſo to do; and as to the Reſt, to make them Defendants. *Nel. Chanc. Rep.* 114.

3. The Plaintiff ſet forth a Conveyance in his Bill, without Date, Day, Month, or Year; and upon Demurrer the Court gave him Leave to amend. *Nel. Chanc. Rep.* 260.

4. The Defendant moved to amend her Anſwer, upon Affidavit, that the Matters untruly ſet forth, were added in the Margent of the Draught after ſhe had peruſed it; and ſo ſhe was thereby ſurprized; and it being alledged, that no Replication was filed *prout* Certificate and Affidavit of Notice of this Motion being read, and the Plaintiff making no Defence, it was ordered that ſhe (*b*) amend her Anſwer in the ſaid Matters miſtaken. Between *Chute* and Lady *Dacre*, 1 *Chanc. Ca.* 29. And the like Liberty ſaid to be given in Lord *Coventry*'s Time.

(*b*) The Defendantmay, without Notice, move to amend his Anſwer in a ſmall Matter; but if it be in a material Point, he muſt give Notice of the Motion for ſuch Amendment to the Plaintiff's Clerk or Solicitor; and tho' it be in a material Point, and after Iſſue joined, yet the Court will, on Affidavit of Surprize, and Payment of Coſts, allow of an Amendment.

5. The Defendant, by her Anſwer, having conſented that an Award made by her Father might be confirmed, deſired Leave to amend her Anſwer in that Particular, having made Oath that ſhe never

never read the Award, and that ſuch Anſwer was prepared by her Father, who had wronged her in the Award; but the Court refuſed to give her Leave to amend her Anſwer. *Harcourt* verſus Lady *Anderſon*, 2 *Vern.* 434. *One Reaſon ſeems to be, becauſe the Father was an Arbitrator of her own Chuſing.*

6. A Recognizance entered into to abide ſuch Order as ſhould be made upon the Hearing of the Cauſe, being put in Suit againſt *A.* who was one of the Sureties; it fell out, that in the Title of the Order for confirming the Report, the Words *Et Ux'* were omitted; the Defendant at Law took Advantage thereof, and pleaded there was no ſuch Order made in the Cauſe; and the Plaintiff perceiving the Miſtake, obtained an Order from the Maſter of the Rolls to amend the Title of the Order, by adding the Words *Et Ux'*, which was afterwards confirmed by my Lord Keeper, altho' it was to charge a Surety. *Trin.* 1700. between *Spearing* and *Lynn*, 2 *Vern.* 376.

7. But in a Cauſe where the Defendant had anſwered, and the Witneſſes were examined, it happened, that in the Title of the Interrogatories, the Plaintiff was called *Thomas* inſtead of *John*, and the Court would not allow the Depoſitions to be read, nor the Title to be amended, although moſt of the Witneſſes were, ſince their Examination, gone to Sea. Between *White* and *Taylor*, 2 *Vern.* 435. *But* Quære, *for this ſeems only a Miſtake of the Clerk, whoſe Errors are frequently amended, the better to carry on the Juſtice of the Court.*

## CAP. VI.

# CAP. VI.

# Annuity and Rent-Charge.

(A) **What shall be construed a good Annuity or Rent-Charge, and whose Persons and Estates made liable.**

(B) **How far a Court of Equity will assist, and give a Remedy for Recovering an Annuity or Rent-Charge, when there is none at Law; and here of Apportionment and Extinguishment.**

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## (A) What shall be construed a good Annuity or Rent-Charge, and whose Persons and Estates made liable.

1. A Man devises all his Lands for the Payment of his Debts, and devises an Annuity out of a certain Town, which the Trustees sell; and it was decreed, that the Annuity should issue out of the other Lands unsold, there being sufficient to pay the Debts. 1 *Chanc. Ca.* 295.

2. An Annuity of 20 *l. per Annum*, was devised out of a Rectory, and the Glebe being but of forty Shillings *per Ann.* Value, and the Tithes not liable to a Distress by (*a*) Law, the Court decreed the whole Rectory to be liable. 1 *Chanc. Ca.* 79.

(*a*) Of Things which lie in Grant and not in Tenure, no Rent can be reserved which will be liable to a Distress, as Advowsons, Tithes, Fairs, Franchises, &c. 1 *Inst.* 44.

3. If a Man covenants to settle Lands of such a Value, or an Annuity out of Land, and he has no Land at the Time, but purchases Lands afterwards, which he voluntarily devises, yet the Lands shall be liable to the Annuity in the Hands of the Devisee. Between *Tooke* and *Hastings*, 2 *Vern.* 97.

4. A Man having debauched a young Woman, and intending afterwards to put a Trick upon her, settled an Annuity upon her of 30 *l. per Annum* for Life, out of an Estate which he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an Estate which he had of his own; and this Decree was after

afterwards affirmed on Appeal to the Houſe of Peers. Cited in the *Marchioneſs* of *Anandale* verſus *Harris*, *Trin.* 1727. and ſaid to have been adjuded about a Year before.

5. *A.* is Tenant in Tail, ſubject to a Rent-Charge to *B.* for Life; *B.* and *A.* died, the Rent-Charge being in arrear; and the Queſtion was, whether the Iſſue in Tail is liable to the Executor of *B.* within the Statute of 32 *H.* 8. to pay the Arrears incurred in the Life-time of his Anceſtor; and my Lord Chancellor ſeemed to be of Opinion, that the Heir was not liable, he not claiming under the Tenant in Tail, tho' if the Rent-Charge had continued, he would be liable to be diſtrained for the whole Arrear, which was *Summum Jus*; and tho' this Caſe ſhould be within the Statute, yet he ſaid the proper Remedy againſt the Iſſue in Tail was at Law. Between Lord *Fairfax* and Lord *Derby*, 3 *Vern.* 612.

## (B) How far a Court of Equity will aſſiſt, and give a Remedy for recovering an Annuity or Rent-Charge, when there is none at Law; and here of Apportionment and Extinguiſhment.

1. A Rent of 1 *l.* 14 *s. per Ann.* was granted by King *H.* 6. to *Eaton* College, iſſuing out of certain Lands; the Bill ſuggeſts, that the College did not know where the Lands lay, ſo as to enable them to diſtrain, and therefore pray that the Executor of the Tertenant may be anſwerable for the Arrears, which the Maſter of the Rolls thought reaſonable, in Reſpect that the Perſonal Eſtate was increaſed thereby; and decreed it accordingly. Between *Eaton College* and *Beauchamp*, *Hill.* 20 *Car.* 2. 1 *Chanc. Ca.* 121.

2. The Bill was for ſecuring the Payment of 5 *l. per Ann.* Rent, and likewiſe the Arrears thereof, ſuggeſting, that the Deeds by which it was granted were loſt; and there being Proof that it was conſtantly paid before the twelve laſt Years, the Maſter of the Rolls decreed the Arrears and growing Rent, ſaying, it was reaſonable, becauſe it did not appear what Kind of Rent it was, and ſo no Remedy at Law. 1 *Chanc. Ca.* 120.

3. So where a Bill was brought, ſuggeſting, that the Plaintiff did not know the Nature of the Rent, nor the Boundaries of the Land, ſo as to be able to declare with Exactneſs; and the Court ſaid they would decree it, but at the Importunity of the Defendant directed a Trial, whether there was any ſuch Grant, or not. Between *Cox* and *Foley*, 1 *Vern.* 359.

4. The Plaintiff ſuggeſts, that he having the Grant of a Rent-Charge iſſuing out of certain Lands, the Defendant to hinder him from a Diſtreſs, converted the Premiſſes into Tillage; and my *Lord Chancellor* directed to have it tried, whether there was any Fraud uſed to prevent the Plaintiff from diſtraining, and declared, if there was, he would grant Relief. Between *Davy* and *Davy*, *Mich.* 2 *Car.* 2. 1 *Chanc. Ca.* 144. but if there be a Remedy at Law, Equity will rarely grant any, or change the Nature of the Rent. *Vide* 1 *Chanc. Ca.* 185.



5. If

5. If a Man grants a Rent-Charge out of all his Lands, and afterwards ſelleth the Lands by Parcels to divers Perſons, the Grantee of the Rent-Charge ſhall be reſtrained from Levying the whole Rent on one of the Purchaſers. *Cary* 3.

6. *A.* on his Marriage, ſettled a Rent-Charge on his Wife for her Jointure, and afterwards deviſed to the Wife Part of the Land ſo ſettled; and it was held that there ſhould be no (*a*) Apportionment, for the Deviſe was intended her as an Advantage; and it was not declared to be in Satisfaction of her Dower, and therefore ſhe may diſtrain for the Rent on any Part of the Land. Between *Knight* and *Calthorp*, *Mich.* 1685. 1 *Vern.* 347.

(*a*) Regularly at Law there can be no Apportionment of a Rent-Charge, becauſe it is an intire Thing. 1 *Rol. Abr.* 234. As if the Grantee purchaſe Part of the Land, he cannot bring a Writ of Annuity, becauſe he muſt declare on the whole Deed. *Co. Lit.* 148. Likewiſe if Part of the Land, out of which the Annuity iſſues, is evicted by a prior Title, there can be no Apportionment; but then the Reſt of the Land is chargeable, or the Party may bring a Writ of Annuity. 1 *Inſt.* 148. But by the Act of God it may be apportioned; as if Part of the Land out of which the Rent iſſues deſcend on the Grantee. 1 *Rol. Abr.* 236.

7. If *A.* hath a Rent-Charge iſſuing out of certain Lands, and *B.* having Notice of this Rent, purchaſes theſe Lands amongſt others; and after *B.* ſells the other Lands, and alſo ſome few Acres of the Land charged by General Words, and deſires *A.* and her Husband to join in a Fine to the Purchaſer, aſſuring her it would not prejudice her, which was accordingly done; though the Rent by *A.*'s Act was extinguiſhed; yet becauſe there was no Conſideration given for, or Agreement to extinguiſh the Rent, ſhe ſhall be relieved. 1 *Chanc. Ca.* 273.

8. *A.* ſeiſed in Fee of a little Meſſuage of 8 *l. per Annum*, and poſſeſſed of a Perſonal Eſtate of 250 *l.* Value, deviſed ſeveral Legacies, and gave his eldeſt Son *B.* the Plaintiff, 5 *l.* a Year for forty Years, if he ſhould ſo long live, and deviſed to his ſecond Son *C.* the ſaid Meſſuage in Tail, and made him his Executor and Reſiduary Legatee. *C.* during his Life, paid the Annuity, but being now dead, his Wife and Executrix inſiſts, that there being no Charge on the Lands by the Words of the Will, and that ſhe not having Aſſets, is not obliged to pay the Annuity; and further alledges, that her Husband having docked the Intail, and conveyed the Premiſſes to *J. S.* in Truſt for the Plaintiff, for the Securing the Payment of 50 *l.* which he borrowed of him, his Right, if he had any, is by the ſaid Mortgage extinguiſhed; but notwithſtanding the Court decreed the Annuity, together with the Arrears, to be paid, and an Account of the Profits of the Eſtate to be taken for that Purpoſe, and ſaid, that the Executor being Deviſee of the Land, made the Land liable; and as to the Objection of his having (*b*) extinguiſhed his Right by Acceptance of the Mortgage, it had no Foundation in a Court of Equity. Between *Elliot* and *Hancock*, *Trin.* 1690. 2 *Vern.* 143.

(*b*) If the Grantee of a Rent-charge purchaſes Part of the Land out of which the Rent iſſues, he ſhall never afterwards have a Writ of Annuity, for his Remedy is extinguiſhed by his own Folly. *Poph.* 86. *Co. Lit.* 148.

# CAP. VII.

# Anſwers, Pleas, Demurrers, &c.

(A) What ſhall be a full and ſufficient Anſwer.
(B) Where the Party may conclude, charge or diſcharge himſelf by his Anſwer.
(C) What ſhall be a good Plea, and well pleaded.
(D) What ſhall be a good Cauſe of Demurrer.
(E) Anſwering, Pleading, and Demurring to the ſame Bill.
(F) Concerning the Replication.

As to the Manner of compelling a Defendant to Anſwer, at what Time, and Anſwering upon Interrogatories, *vide* Title **Proceſs.**

## (A) What ſhall be a full and ſufficient Anſwer.

1. WHERE in a joint and ſeveral Anſwer by *A.* and *B.* if *A.* for himſelf Anſwers, and *B.* ſays that he hath peruſed the Anſwer of *A.* and believes it to be true, ſuppoſing *B.* charged with nothing of his own Knowledge, ſuch a relative Anſwer is (*a*) ſufficient, but it is otherwiſe where the Defendants anſwer ſeverally. Between *Walker* and *Norton*, *Hard.* 105.

(*a*) An Anſwer to a Matter charged as a Defendant's own Fact, muſt regularly be without ſaying, To his Remembrance, or, As he believeth, if it be laid to be done within ſeven Years before, unleſs the Court, upon Exceptions taken, ſhall find ſpecial Cauſe to diſpenſe with ſo poſitive an Anſwer; and if the Defendants deny the Fact, he muſt traverſe or deny it (as the Cauſe requires) directly, and not by Way of Negative pregnant; as if he be charged with the Receipt of a Sum of Money, he muſt deny or traverſe, that he hath not received that Sum, or any Part thereof, or elſe ſet forth what Part he hath received; and if a Fact be laid to be done, with divers Circumſtances, the Defendant muſt not deny, or traverſe it literally, as it is laid in the Bill, but muſt Anſwer the Point of Subſtance poſitively and certainly. *Clarendon's Orders*, 18 *Car.* 2.

2. In a Bill for Tithes of Conies by Cuſtom, the Defendants by Anſwer deny the Cuſtom, but do not diſcover how many Conies they killed, nor the Value of them; yet it was reſolved well enough, (the rather, becauſe the Demand was againſt Common Right) for there being a full Anſwer given to the Thing in Demand, till that be tried, the Defendants are not bound to diſcover; and if it ſhould be otherwiſe, the Defendant, by a feigned Suggeſtion, might be forced to diſcover any Thing; but if in ſuch Caſe the Matter be found againſt the Defendant, he ſhall after be examined upon Interrogatories. *Paſch.* 13 *Car.* 2. between *Randall* and *Head*, *Hard.* 188.

3. But where there is no ſuch great Inconvenience, as upon a Bill againſt an Executor to diſcover Aſſets, he muſt Anſwer, tho' he denies the Debt, becauſe it concerns the Act of another. *Hard.* 188.

4. If a Bill be brought againſt Three for a joint Demand, and one of them by Anſwer ſays, he believes and hopes to prove the Debt paid; and the Cauſe is heard on Bill and Anſwer as to him, the Plaintiff can have no Decree; for tho' the Defendant does not directly ſwear that the Money is paid, yet his Anſwer muſt be taken to be true, becauſe the Plaintiff, by not replying to him, has excluded him of the Benefit of his Proof; and the rather, becauſe it appears a Piece of Cunning in the Plaintiff to proceed againſt him, who was moſt ignorant of the Matter; but upon Payment of Coſts he may reply to the other Defendants. *Hill.* 1682. between *Barker* and *Wyld*, 1 *Vern.* 140.

5. On Exceptions to an Anſwer, the Defendant having ſworn he received no more than the Sum of——— to his Remembrance, it was allowed to be a good Anſwer. Between *Hall* and *Bodily*, 1 *Vern.* 470.

6. If the Plaintiff excepts to the Anſwer, and the Exceptions are referred, and the Maſter certifies the Anſwer inſufficient in the Points excepted to, and then the Defendants fully anſwer the Charge of the Bill; but in Truth the Exceptions are longer than the Bill; and the Maſter, upon a Reference of the ſecond Anſwer, reports the Anſwer inſufficient in the Points excepted unto, and the Defendants except unto the Report, and inſiſt, that they had anſwered well, having anſwered all the Matters of the Bill; yet they ſhall Anſwer all the Matters of the Exception as well as of the Bill, they not having excepted to the firſt Report. Between *Criſpe* and *Nevil*, 1 *Chanc. Ca.* 60.

7. If there are two Defendants to a Bill, and one of them puts in an inſufficient Anſwer, which is ſo reported, and on Exceptions to the Maſter's Report, his Report is confirmed by my Lord Chancellor; and afterwards the other Defendant puts in juſt ſuch another Anſwer, and inſiſts on the ſame Matter; the Court, for avoiding of Delay, will judge of the Inſufficiency of this ſecond Anſwer, without ſending it to a Maſter. 1 *Vern.* 74.

## (B) Where the Party may conclude, charge or diſcharge himſelf by his Anſwer.

1. THE Plaintiff brought a Bill againſt the Defendant to redeem, or be foreclоſed; the Defendant, in his Anſwer, offered to pay the Plaintiff what was due on his Mortgage; but finding afterwards that there was a Mortgage prior to the Plaintiff's, and that the Mortgagor had made a Deed of Truſt of theſe Lands for the Payment of his Debts; and that the Creditors had obtained a Decree that they ſhould be paid in Proportion with the Plaintiff, he would willingly retract; but tho' it appeared that the Circumſtances of the Caſe were thus varied, yet the Maſter of the Rolls held the Defendant to the Offer in his Anſwer. *Paſch* 1687. between *Holford* and *Burnell*, 1 *Vern.* 448.

2. But where a Perſon having ſworn in his Anſwer, to avoid a Sequeſtration, that he was ſatisfied a Debt owing to him in a Bill now brought by him for the ſaid Debt; the Maſter of the Rolls would not ſuffer that Anſwer to be read againſt him. *Mich.* 1669. between *Jones* and *Lenthall*, 1 *Chanc. Ca.* 154.

3. Where the Defendant pleaded himſelf a Purchaſer for a valuable Conſideration, without Notice, *as by the Deed*, &c. *ready to be produced, may appear*; and upon arguing the Plea, it was ordered to ſtand for an Anſwer; and it being moved, that the Defendant might leave the Deed with his Clerk in Court, that the Plaintiff might have the Sight and Peruſal of it, purſuant to the Offer in his Anſwer, and though the Bar (being asked by the Court how the Courſe was) agreed, that by his Offer the Defendant had made the Deed Part of his Anſwer; and therefore it had been the Courſe to order it to be produced; yet my *Lord Chancellor* ſaid, he would not bind the Plaintiff, being a Purchaſer, by the improvident Offer in his Anſwer. *Mich.* 1698. between *Watkins* and *Hatchet*.

4. It was ſaid *per Cur'*, That the Caſe of *Howard* and *Brown* was the firſt Caſe in this Court, where, becauſe a Man had charged himſelf by Anſwer, that this Anſwer ſhould be allowed as a good Diſcharge, and that it ought to be the laſt. 2 *Vern.* 194. *Where an Accountant may charge or diſcharge himſelf by Anſwer*, vide *Title* **Account**, *Letter* (B).

5. If the Plaintiff conveys an Eſtate abſolutely to the Defendant, and he afterwards brings a Bill to redeem, and the Defendant inſiſts, that the Conveyance was abſolute; but confeſſes, that after the Money paid, with Intereſt, it was to be in Truſt for the Plaintiff's Wife and Children; and the Plaintiff replies to the Anſwer; the Truſt will be decreed for the Benefit of the Wife and Children tho' no other Proof of the Truſt; for it appears by the Defendant's, own Confeſſion, that he was not to have the Eſtate abſolutely. *Paſch.* 1693. between *Hampton* and *Spencer*, 2 *Vern.* 288.

## (C) What ſhall be a good Plea, and well pleaded.

1. THE Bill being to be relieved touching a Debt due to the Plaintiff as Executor; the Defendant pleaded an Outlawry of the Plaintiff in Bar, but the (*a*) Plea was over-ruled, the Plaintiff ſuing in *auter droit* as Executor. *Killigrew* and *Killigrew*, 1 *Vern.*

(*a*) Pleas in Equity are of three Kinds, &c. 1ſt, A Plea to the Juriſdiction; 2dly, A Plea to the Perſon; 3dly, A Plea in Bar. A Plea to the Juriſdiction muſt ſhew, that the Lands lie, that the Matters were tranſacted, or that the Party lives, out of the Power of the Court, and Reach of its Proceſs, as out of the Kingdom, or in a County Palatine, &c. but for this, (*vide* Title *Courts, and their Juriſdiction*). A Plea to the Perſon, muſt ſhew that the Party is diſabled by Outlawry, Excommunication, &c. A Plea in Bar as it goes more to the Merits, and often cauſes a perpetual Diſmiſſion of the Bill, the Court will ſometimes order it to ſtand for an Anſwer. Pleas of this Kind are various, as Acts of Parliament, Fines and Recoveries, Releaſes, &c. Purchaſing without Notice; but Notice muſt be denied. 1 *Vern.* 179. 2 *Vent.* 361. *S. P.* by Way of Anſwer, and not by Way of Plea. 2 *Chan. Ca.* 161. And *Note*, That if there be any Fraud alledged in the Bill, it muſt be denied by Way of Anſwer, and not by Way of Plea. 1 *Vern.* 185.

2. A former Bill depending was pleaded in Bar of a ſecond; but tho' both Bills were of the ſame Nature and Effect, yet as the latter had ſome new Matter, Ordered, that being the Plea was good, the Plaintiff ſhould pay the uſual Coſts of a Plea allowed, but the Defendant to anſwer the ſecond Bill, and the former Bill diſmiſs'd with twenty Shillings Coſts. Between *Crofts* and *Wortley*, *Mich.* 26 *Car.* 1 1 *Chan. Ca.* 241.

3. The Bill being to have an Account of a Truſt, the Defendant pleaded he was intruſted for three Children, *viz.* for the Plaintiff and his two Brothers, and that the other Two not being made Parties, he was not bound to anſwer; for otherwiſe he might be thrice called to an Account for the ſame Matter, and the Plea was allowed. Between *Hanne* and *Steevens*, 1 *Vern.* 110. *Who are to be Parties to the Suit*, vide *Title* **Bill**, *Letter* (B).

4. The Plaintiff intitles himſelf as Adminiſtrator; the Defendant pleads the Plaintiff is not Adminiſtrator; it was objected, this was a negative Plea: *Per Cur'*, Allow the Plea, it is a good Plea in Abatement at Law. Between *Win* and *Fletcher*, 1 *Vern.* 473.

5. The Bill was, that the Plaintiff's Father, by Settlement on his firſt Marriage was only Tenant for Life, or elſe Tenant in ſpecial Tail, and the Plaintiff was the eldeſt Son of that Marriage, and that the Defendant claimed by a ſubſequent Settlement, having Notice of the firſt; the Defendant pleaded a Fine levied by the Father, and ſet forth her Title under the ſecond Settlement, and inſiſted ſhe was a Purchaſer; but did not plead ſhe had no Notice of the firſt Settlement. *Lord Keeper*: The Bill being in the Disjunctive, the Defendant might take it either Way; and having pleaded a Fine, which is a Bar, ſuppoſing the Father to be Tenant in Tail, allowed the Plea. Between *Creſſet* and *Kettleby*, *Hill.* 1683. 1 *Vern.* 219.

6. Two of the Defendants, being the Officers of the Exchequer, plead the Privilege of the Exchequer; but the Plea was over-ruled, becauſe there was a third Defendant, who had no Right of Privilege.

Between *Fanſhaw* and *Fanſhaw*, *Trin.* 1684. 1 *Vern.* 246. *Vide* Title **Privilege.**

7. If a Bill be brought for an Account of the Profit of *Mines*, and the Defendant pleads a ſpecial Act of Parliament, which gives an excluſive Juriſdiction of all Matters ariſing within the Mines to the Courts of *A.* but does not aver there is a Court of Equity, there the Plea will be over-ruled. Between *Strode* and *Little*, 1 *Vern.* 58.

8. If a Bill is brought to be relieved upon a Truſt, and charges the Defendant with Notice of the Truſt; before the Taking of his Conveyance, the Defendant, by Way of Anſwer, may deny the Notice and plead he is a Purchaſer for valuable Conſideration, without ſhewing what the Conſideration was; tho' it was objected, that 5 *s.* is a valuable, tho' not an equitable Conſideration; but where the Bill charges Notice before the Defendant took his Conveyance, and the Defendant, by Way of Anſwer, denies the Notice at the Time of his Purchaſe or Contract, and pleads he is a Purchaſer, *&c.* this Plea is naught, being founded upon the Anſwer, which denies only Notice at the Time of the Purchaſe; which may be underſtood of the Contract, and not of the Execution of the Conveyances. *Mich.* 1 *Car.* 2. between *Moor* and *Mayhew*, 1 *Chan. Ca.* 34.

9. The Plaintiffs being Mortgagees, the Bill was to diſcover Settlements, and what Eſtate the Mortgagor had in him; to this Bill the Defendants pleaded two ſeveral Settlements, whereby the Mortgagor was only Tenant for Life; but the Plea was over-ruled, becauſe the Defendants did not offer, by Way of Anſwer, to admit the Tenant for Life to be dead, that ſo the Plaintiff might try the Validity of thoſe Settlements at Law; for if they ſhould expect till the Tenant for Life was dead, their Witneſſes that could prove the Fraud might be likewiſe dead; beſides, the Defendants pleaded thoſe Settlements to be made after Marriage, in Purſuance of Promiſes and Agreements made before Marriage, and did not ſet forth what thoſe Promiſes or Agreements were. *Hill.* 1682. *Lord Keeper & al* verſus *Wyld & al*, 1 *Vern.* 139.

10. A Plea of a Purchaſer for a valuable Conſideration overruled, becauſe the Defendant did not alledge Seiſin and Poſſeſſion in the Perſon from whom he bought. *Trin.* 1684. between *Trevanion* and *Moſſe*, 1 *Vern.* 246.

11. The Bill was to be relieved touching certain Lands, which the Plaintiff claimed Title to as Heir on the Part of his Father; the Defendant pleaded, that the Mother was the Purchaſer of thoſe Lands, and that the Defendant was Heir on the Part of the Mother; but it being not pleaded that the Defendant was Heir of the Whole Blood to the Mother, (and in Fact he was only of the Half Blood to the Mother,) for that Reaſon the Plea was over-ruled. *Hill.* 1686. between *Addiſon* and *Hindmarſh*, 1 *Vern.* 442.

12. The Defendant pleads, that the Plaintiff brought a former Suit for the ſame Matters, which Suit is ſtill depending for ought he knows to the contrary; for the Plaintiff it was inſiſted, that this Plea was not good, becauſe he does not poſitively aver, that the former Suit is ſtill depending; and no Iſſue can be taken upon his Knowledge to the contrary; but the Maſter of the *Rolls* allowed the Plea, becauſe the Defendant ought not to have ſet it down to be argued,

for by that he admits that the former Suit for the ſame Matter is depending; but the Plea ought to have been referred to a Maſter, to examine whether there was a former Suit depending for the ſame Matter, or not; and ſaid, there needs no poſitive Averment, that the former Suit is ſtill depending, for that is examinable by the Maſter; and the Defendant never ſwears a Plea of a former Suit depending, but it is always put in without Oath. 1 *Vern.* 332. *vide Hard.* 160. where a Plea was held naught for Want of an Averment in the Concluſion,

13. A Plea was held ill, becauſe it went as to any Fraud ſuggeſted, *&c.* and alſo becauſe it did not aver, that the Accounts which were pleaded, were juſt and true Accounts. *Mich.* 1727. between *Haſtings* and *Draper*.

14. One *Pordant* had brought a Bill in this Court againſt the Defendants, for ſeveral Shares in their Stock, and after ſold a ſixth Part of what he was intitled to from the Defendants to the Plaintiff, who now brought his Bill for his ſixth Part; the Defendants pleaded, that *Pordant* had before brought his Bill for ſeveral Shares, of which the Plaintiff's now Demand was Part, and that the former Suit was ſtill depending; but becauſe he had not averred, that the Defendants had appeared to the former Suit, or put in their Anſwer, or that they were ſo much as ſerved with Proceſs to appear, the Plea was diſallowed; for it is no Suit depending till the Parties have appeared, or been ſerved to appear, but only a Piece of Parchment thrown into the Office, which may lie there for ever, and never come to a Suit; but if the former Suit depending had been well pleaded, the Court was clear of Opinion it would have been a good Plea, tho' the Bill was brought by another Perſon, and not by the now Plaintiff; for elſe the Plaintiff in the other Suit, after his Bill brought, might aſſign his Shares to twenty ſeveral Perſons, who might each of them bring ſeveral Bills, and ſo harraſs the Defendants, for what the firſt Suit was ſufficient. *Trin.* 1729. between *Moor* and *Welſh-Copper Company*.

## (D) What ſhall be a good Cauſe of Demurrer.

1. IF in a Bill brought againſt *B. C. D.* and *E.* the Plaintiff ſets forth that he is Keeper of *G.* Caſtle, and prays *B.* may diſcover what Title he hath to a certain Meadow which belongs to the ſaid Office, and that the Defendants, as Brewers of the City of *G.* by Cuſtom ought to pay to the ſaid Keeper a certain annual Sum, *&c.* this Bill is naught, becauſe it concerns Things of diſtinct Natures, and is brought againſt ſeveral Perſons, which will occaſion ſeveral Anſwers and Examinations; and if ſuffered to be put all in one Bill, each Party would be obliged to take Copies of what no Way concerned his own Cauſe, whereby his Charge would be increaſed to no Purpoſe. Reſolved upon Demurrer, 15 *Car.* 2. between *Berk* and *Harris*, *Hard.* 337.

2. But where the Defendant demurred, becauſe the Plaintiff's Bill was brought againſt ſeveral Defendants for ſeveral diſtinct Matters, yet the Demurrer was over-ruled; becauſe the Plaintiff, by his Bill, had charged the Defendant with Combination, which the Defendant had not denied by Anſwer. *Mich.* 1686. between *Powell* and *Arderne*, 1 *Vern.* 416.

3. Where

3. Where a Man demurs, for that the Bill contains ſeveral Matters not relating one to the other, and in ſome whereof the Defendant is not concerned, if by Anſwer the Defendant doth more than barely deny Combination and Confederacy, he over-rules his Demurrer. *Trin.* 1687. between *Heſter* and *Weſton*, 1 *Vern.* 463.

4. A Bill was exhibited againſt the Defendant, to have her diſcover, whether ſhe was married ſince the Death of her Husband; to which ſhe demurred, and aſſigned for Cauſe, that ſeveral Goods and Chattels were deviſed to her by her Husband, which ſhe was to enjoy during her Widowhood only, and that a Diſcovery might amount to a Forfeiture of her Intereſt in them; and the Court allowed the Demurrer. 24 *Car.* 2. *Monnins* verſus *Monnins*, 2 *Chan. Rep.* 68. Vide *Bills of Diſcovery*, Title **Bills.**

5. The Bill was to eſtabliſh an Agreement for a ſeparate Maintenance for the Defendant's Wife, and (amongſt other Things) prayed a Diſcovery of ſeveral Unkindneſſes and Hardſhips, which the Defendant, as it was pretended, had uſed towards his Wife, to make her recede from this Agreement; to which Diſcovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court; and the Demurrer was allowed. *Mich.* 1683. between *Hincks* and *Nelthorpe*, 1 *Vern.* 204.

6. A Bill being exhibited to be relieved againſt a Bond of the Teſtator's, ſuggeſting, that it was entered into without any Conſideration, it being only for that the Teſtator had unlawfully kept Company with the Defendant, and had a Baſtard by her; and a Demurrer to that Part of the Bill was allowed; although it ſeems by the Caſe to be admitted, that a Demurrer was not the proper Way to be relieved for Scandal, but that the Bill ought to be referred, and the Scandal expunged. *Mich.* 1682. between *Page* and *Neale*, 1 *Vern.* 107.

7. If an Infant is intitled to the Truſt of Lands in Fee, which were deviſed to her by her Uncle, and ſhe marries without her Father's Conſent, and the Father brings a Bill againſt the Husband and Wife, and her Truſtees, to the Intent a Proviſion might be made for her and her Children, out of theſe Lands, *&c.* and the Husband and Wife demur, this Demurrer will be allowed; for it appears by the Plaintiff's own ſhewing, that he hath no Right either in Law or Equity to the Lands in Queſtion. *Paſch.* 34 *Car.* 2. between *Micoe* and *Powell*, 1 *Vern.* 39. But where a Husband is obliged to make a ſuitable Settlement on his Wife, *vide* Title **Baron and Feme.**

8. In a Bill to be relieved againſt an Award made by ſome of the Members of the *Company*, touching the *Quantum* of Freight due to the Plaintiff from the Company; the Arbitrators and ſome of the particular Members being made Defendants, they demurred to the whole Bill, becauſe the Plaintiff could have no Decree againſt them, and their Anſwers would be no Evidence againſt the Company; and the Plaintiff might examine them as Witneſſes; and the Demurrer was allowed, without putting them to anſwer as to Matters of Fraud and Contrivance. *Trin.* 1700. Dr. *Steward* verſus *Eaſt-India Company*, 2 *Vern.* 380.

9. A Bill was brought by the Obligee in a Bond againſt the Heir of the Obligor, alledging, that he having Aſſets by Diſcent, ought to ſatisfy this Bond, to which the Defendant had demurred, becauſe

the Plaintiff had not expreſly alledged in the Bill, that the Heir was bound in the Bond; and tho' it was alledged, that the Heir ought to pay the Debt, yet that was held inſufficient, and the Demurrer was allowed. Between *Croſſing* and *Honor*, 1 *Vern.* 180.

10. A Bill being exhibited to diſcover a perſonal Eſtate and Will; the Defendants demurred, becauſe it appeared on the Plaintiff's own ſhewing, that they were neither Creditors or Legatees; and the Demurrer was allowed. *Nel. Chanc. Rep.* 88.

11. A Bill being exhibited to prove a Will, and perpetuate the Teſtimony of the Witneſſes; the Defendant, upon Croſs Examination of one of the Witneſſes, exhibited an Interrogatory to him to diſcover what Deeds or Settlements he knew the Teſtator had made; to which the Witneſſes demurred, as not pertinent to the Matter in Iſſue; and the *Lord Keeper* over-ruled the Demurrer, becauſe he would not introduce ſuch a Precedent as for a Witneſs to demur; for it did not concern the Witneſs to examine what was the Point in Iſſue. *Aſhton* and *Aſhton*, 1 *Vern.* 165.

12. There can be no Demurrer to a *Subpœna* in Nature of a *Scire Facias*, for the *Subpœna* is no Record, nor any where filed. 1 *Chan. Ca.* 50. Neither can there be a Demurrer to an Anſwer, *vid.* 1 *Chanc. Ca.* 56. but *vid.* 2 *Chanc. Ca.* 8. *cont'.*

## (E) Anſwering, Pleading, and Demurring to the ſame Bill.

1. THE Defendant had pleaded a former Decree in Bar to the Plaintiff's Bill, but the Plea was not ſuffered to be opened, for that it came in after a Proclamation returned; and alſo came in by a General Commiſſion, which was to take the Anſwer only, and not plead, anſwer, or demur. Between *Loyd* and *Gunter*, 1 *Vern.* 275.

2. Where the Defendant anſwers to Part, and pleads to all other Matters not anſwer'd unto, the Plaintiff cannot put in Exceptions to the Anſwer, till he has firſt argued the Plea, or obtained an Order, that the Plea ſhall ſtand for an Anſwer, with Liberty to except to the Matters not pleaded unto. Between *Dannell* and *Reyney*, 1 *Vern.* 344.

3. The Plaintiff brought his Bill to be relieved againſt a Fraud in the Defendant, in cauſing a Ship to be ſunk, upon which he had made ſeveral Inſurances, and the Plaintiff had ſubſcribed ſeveral of the Policies. Defendant, as to Part, pleads Pendency of a former Suit, and then anſwers to Part, and denies all the Fraud charged on him by the Bill: Plaintiff replies generally to the Anſwer, without taking Notice of the Plea; and Witneſſes were examined on both Sides, and the Cauſe heard, and a Trial at Law directed, which went againſt the Defendant, who petitions for a Rehearing; and on the Rehearing the Defendant inſiſted, that the Plaintiff had been utterly irregular in his Proceedings, for not ſetting down the Plea to be argued and diſpoſed of by the Court before he replied; for the Plaintiff himſelf cannot take upon him to over-rule it, be it what it will, but muſt bring it for Judgment before the Court, and for Want of that, all was irregular, and ought to be ſet aſide; but my *Lord Keeper* and Maſter of the *Rolls* were both of Opinion,

that the Defendant by theſe Proceedings had waved his Plea, and therefore the Proceedings were regular; ſo the Cauſe went on, and the former Decree was affirmed. *Mich.* 1701. between *Lucas* and *Holder*.

4. Where a Defendant has demurred, he may aſſign another Cauſe of Demurrer at the Bar, paying Coſts; and if ſuch Cauſe of Demurrer is over-ruled, he ought to pay double Coſts; but where a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, tho' he would pay Coſts. Between *Durdant* and *Redman*, 1 *Vern.* 78.

5. The Plaintiff's Bill was to eſtabliſh a voluntary Surrender made by him and his Wife of her Lands, to the Uſe of him and his Heirs, againſt the Defendant, who was the only Daughter and Heir of the Plaintiff's Wife, by a former Huſband; and the Wife was now dead; this Surrender was made in Purſuance of a Power reſerved by a former Surrender to the Wife, to ſurrender it to ſuch Uſes as ſhe by Writing, or Laſt Will, in the Preſence of three Witneſſes, ſhould direct or appoint; and the preſent Surrender, under which the Plaintiff claims, was made in the Preſence of two Witneſſes only, who ſubſcribed their Names; but the Deputy Steward, who took the Surrender, had ſet his Name to it, and ſo might be conſidered as a third Witneſs, on which the Bill was brought to eſtabliſh this as a good Surrender, purſuant to the Power; the Defendant pleaded, and claim'd Title under a Will made by the Wife, in Purſuance of her Power, executed in the Preſence of three Witneſſes, antecedent to the Surrender to the Uſe of the Plaintiff, and likewiſe demurs; for that if the Plaintiff had any Title, it was a Title meerly at Law, and he might bring his Ejectment, if he thought fit; and it was objected, that this Plea and Demurrer were for one and the ſame Thing, and therefore inconſiſtent and contradictory in themſelves; for the Plaintiff may reply to the Plea, and go on upon that in this Court; but the Demurrer ſays he has nothing to do in this Court, but muſt go to Law; ſo that the one is to keep him here, and the other to ſend him to Law; and though it is frequent to plead to one Part of a Bill, and demur to another Part; yet it was never known, that the Defendant pleaded and demurred to one and the ſame Part of the Bill, by Reaſon of the Inconſiſtency. On the Plea being firſt, it was inſiſted That gave this Court Juriſdiction, and then the Demurrer afterwards, to ſend the Plaintiff to Law, came too late; or at leaſt it was urged, that the Demurrer had over-ruled the Plea, and that both could not ſtand. My Lord Chancellor ſeemed to think the Plea was good as a Plea of the Defendant's Title, and the Demurrer good likewiſe, as it was a Demurrer to the Plaintiff's Title; but at laſt he over-ruled the Plea, and allowed the Demurrer. *Trin.* 1728. between *Cotter* and *Layer*.

## (F) Concerning the Replication.

1. IF there is a Plea and Anſwer to the ſame Bill, and the Plaintiff replies to the Plea only, it will be irregular, for the Replication muſt be to the Anſwer as well as the Plea. The Cauſe put off for that Irregularity. Between *Nichol* and *Wiſeman*, 2 *Vern.* 46.

2. If the Plaintiff replies to an Anſwer, and without Rejoinder, and giving Rules for Publication, brings the Cauſe to an Hearing, the Anſwer ſhall be taken wholly true, as if there had been no Replication; for the Opportunity which the Defendant had to prove his Anſwer was taken from him. 2 *Chanc. Ca.* 21.

3. If after a Plea or Demurrer to a ſpecial Replication allowed, the Plaintiff may be admitted to put in a General Replication, *Q. & vid.* 1 *Vern.* 351. Where it was urged by Counſel that he may; but the Court refuſed to give any Opinion.

4. The Plaintiff ſet down this Cauſe to be heard on a Bill and Anſwer, and had a Decree againſt the Defendant by Default; and when the Defendant came to ſhew Cauſe againſt the Decree, it was altered in his Favour; the Plaintiff petitioned to rehear the Cauſe, and at the Rehearing prayed Leave to reply to the Defendant's Anſwer, and had it, paying Coſts. *Mich.* 1699. between Lord *Donegall* and *Warr.*

CAP.

# CAP. VIII.

# Aſſignment and Privity.

(A) **What Things or Intereſt may be aſſigned in Equity.**

(B) **The Privity of Contract or Eſtate being deſtroyed, what Remedy Grantees or Aſſignees ſhall have againſt each other in Equity.**

## (A) What Things or Intereſt may be aſſigned in Equity.

1. IF a Man indebted to ſeveral Perſons ſells his Lands, and takes a Bond for the Money from the Purchaſer, and aſſigns theſe Bonds to one of his Creditors, ſuch Aſſignment is (*a*) good in Equity. *Nel. Chanc. Rep.* 299.

(*a*) Poſſibility, Right of Entry, or Thing in Action, or Cauſe of Suit, or Title for a Condition broken, cannot be granted or aſſigned over by Law. 1 *Inſt.* 214. And it has been adjudged in *B. R.* that an Aſſignee of a Covenant could not ſue in Equiy to have the Benefit of the Covenant, it being againſt Law to aſſign a Covenant; and a Prohibition was granted to the Court of Requeſts for ſuch a Suit there. 1 *Rol. Abr.* 376. But tho' a Bond cannot be aſſigned over, ſo as to enable the Aſſignee to ſue in his own Name; yet he has by the Aſſignment ſuch a Title to the Paper and Wax, that he may keep or cancel it. 1 *Inſt.* 232.

2. A Choſe in Action is aſſignable in Equity upon a Conſideration paid. *Per Cur'.* 2 *Vern.* 595. But there muſt be a Conſideration. 3 *Chanc. Rep.* 90.

3. If *A.* aſſigns Bonds to *B.* to indemnify him from a Debt for which he was bound for *A.* and afterwards *A.* becomes a Bankrupt, the Aſſignees of *A.* the Bankrupt can have no better Right to theſe Bonds than the Bankrupt himſelf; and he being bound by the Aſſignment, they are bound likewiſe. 2 *Vern.* 428.

4. In the Caſe of an Aſſignment of a Bond, the Aſſignee alone becomes intitled to receive the Money; and Payment to the Obligee after Notice of the Aſſignment, is not good. *Per* Lord Keeper, 2 *Vern.* 540. but Payment to the Obligee, without Notice of the Aſſignment, is good. 1 *Chanc. Ca.* 232. An Aſſignee muſt take it,

ſubject to the ſame Equity that it is in the Hands of the Obligee. *Vid.* 2 *Vern.* 692.

5. As if on a Treaty of Marriage between *A.* and the Daughter of *B.* the Mother of *A.* ſurrenders Part of her Jointure to enable her Son to make a Settlement, and *B.* agrees to give his Daughter 3000 *l.* Portion, and *A.* without the Privity of his Mother, gives a Bond to *B.* to pay back 1000 *l.* at the End of ſeven Years, and *B.* aſſigns this Bond to his Creditors; yet it ſhall be delivered up as obtained in Fraud of the Marriage Agreement; for although a Bond is aſſignable in Equity, yet it ſtill remains liable to the ſame Equity that it was in the Hands of the Obligee. *Mich.* 1718. between *Turton* and *Benſon*, 2 *Vern.* 764.

6. A Seaman aſſigns his Wages for ſecuring the Payment of a Debt due by ſimple Contract; and he dying ſoon afterwards Inteſtate, and leaving Bond Debts, it was decreed that the Aſſignee ſhould be paid only in a Courſe of Adminiſtration. *Mich.* 1700. between *Mitchel* and *Edes*, 2 *Vern.* 391. *Note*; The Reaſon hinted at is, becauſe the Agreement to aſſign, amounted to no more than a Letter of Attorney to receive them, which was revoked by his Death.

7. For where a Seaman aſſigned his Wages as a Security for Money, and died indebted to other Perſons, it was held that this Aſſignment ſpecifically bound the Wages, and that the Money ſecured thereby ſhould be paid preferable to all other Debts. *Mich.* 1707. between *Crouch* and *Martin*, 2 *Vern.* 595.

8. An Adminiſtrator *De bonis non* of the Conuſee of a Statute, had agreed with the Conuſor, to aſſign it in Conſideration of a Sum of Money, which upon the ſaid Agreement, the Conuſor had covenanted to pay him, his Executors or Adminiſtrators, and then the Adminiſtrator died; and the Court decreed the Money to be paid to the Executor of the Adminiſtrator, and not to the Adminiſtrator *De bonis non*, altho' before the Extent it could not be aſſigned at Law. 2 *Vent.* 362. The Reporter adds a Note, that there were no Debts appearing of the firſt Inteſtate's. If there had been Debts, it would have belonged to the Adminiſtrator *De bonis non*. 1 *Rol. Abr.* 380.

9. A Man by his Will gives a Legacy of 300 *l.* to a Feme Covert, without creating any ſeparate Truſt of it for her Benefit, and this Legacy was made payable out of a Reverſion of Lands expectant on an Eſtate for Life; the Husband ſometime after makes an Aſſignment of this Legacy to Truſtees, in Truſt for the Benefit of his Children; and after by his Will takes Notice again of the ſame Legacy, and deviſes it in like Manner for the Benefit of his Children, and makes his Wife Executrix, and dies; the Eſtate for Life drops, and the Widow applies to the Executor of the firſt Teſtator for her 300 *l.* Legacy; and thereupon ſhe and the Executor come to an Agreement, that ſhe ſhould accept 200 *l.* only, in full of her ſaid Legacy, and accordingly the 200 *l.* was paid, and ſhe gave a Releaſe for the whole Legacy; and it appearing in the Cauſe, that ſhe had Notice both of the Will and Aſſignment, and that ſhe gave no Manner of Notice of it to the Executor; the Court decreed, that as the Husband had made good Aſſignment of it in Equity, (tho' as a *Choſe in Action* it was not aſſignable by Law) that ſhe ſhould be anſwerable to the Children for the 200 *l.* ſhe had received; but as to the

100 *l.* which the Executor had drawn her in to releaſe, he himſelf ſhould be chargeable, he being thereby no Ways injured, ſince he ought at firſt to have paid the whole Legacy; and though this Legacy was charged on a Reverſion, which was not an immediate Fund for the raiſing of it; yet being given to the Wife *in præſenti*, when the Fund comes in, it ſhall carry Intereſt from the Teſtator's Death, which muſt likewiſe go to Children. *Mich.* 1714. between *Atkins* and *Dawbeny*. *But of what Things of the Wife's may the Husband diſpoſe, and when*, vide *Title* **Baron and Feme.**

10. *A.* poſſeſſed of a Term ſettles it in Truſt to the Uſe of himſelf and his Wife for Life, Remainder to the Uſe of ſuch Iſſue of the Husband and Wife, as he ſhould by Will appoint; he by Will ſettles it on *B.* his Son, who in the Life-time of his Mother aſſigns and releaſes it to *C.* to whom the Truſtees likewiſe aſſign their Intereſt; and it was held by the Court, with the Advice of the Judges, that tho' a Grant of a future Poſſibility is not good in Law, yet a Poſſibility of a Truſt in Equity may be (*b*) good; and that it was the rather ſo in this Caſe, becauſe the Truſtees joined in it. 4 *Car.* 1. between *Warmeſtry* and *Tanfield*, 1 *Chanc. Rep.* 29.

(*b*) If there be a Deviſe of a Term to *A.* for Life, Remainder to *B.* *B.* cannot in the Life-time of *A.* aſſign his Intereſt, becauſe but a Poſſibility. 10 *Co.* 47. *Lampet's* Caſe, 1 *Sid.* 188. *S. P.*

11. Where any Perſon has the Truſt of a Poſſibility in Remainder of a Term, he has Power to declare, and make a Diſpoſition of the Truſt of ſuch Poſſibility, agreed by Counſel. 1 *Chanc. Ca.* 8.

12. *Ceſtui que Truſt* of a Term, upon his Wife's Joining with him in a Sale of Part of her Jointure, directs, that after his and his Wife's Death, his Truſtees ſhould aſſign the Reſt of the Term to his Wife's Daughter, when ſhe ſhall attain the Age of twenty-one, or be married; the Daughter marries, and ſhe and her Husband aſſign their Intereſt in the Term, in the Life-time of *Ceſtui que Truſt* and his Wife; and the Queſtion was, whether ſuch a Poſſibility could be aſſigned; and *per* Lord *Keeper*, it is a Notion that has obtained at Law, that a Poſſibility cannot be aſſigned; yet if it were *res integra*, there is no Reaſon for it; yet the Rule of Law muſt be the Rule here, for *Æquitas ſequitur Legem*; and he diſmiſſed the Plaintiff's Bill, which ſought the Benefit of this Aſſignment, but without Coſts. Between *Freeman* and *Thomas*, *Mich.* 1706. 2 *Vern.* 563.

## (B) The Privity of Contract or Eſtate being deſtroyed, what Remedy Grantees or Aſſignees ſhall have againſt each other in Equity.

1. IF *A.* Leaſes to *B.* a Wine-Licence for Years, rendring Rent, and *B.* aſſigns to *C.* and *C.* for valuable Conſideration aſſigns to *D.* who had no Notice of the Rent, *A.* ſhall not charge *D.* with the Rent, for the Contract was Perſonal, as in Caſe of a Leaſe of a Fair, *&c.* and *Æquitas ſequitur Legem*, eſpecially when the Aſſignee is a Purchaſer for valuable Conſideration, without Notice. *Mich.* 1656. between *James* and *Blank*, *Hard.* 88. but if he had

been a Purchaſer, with Notice, he would have been liable in Equity during his Enjoyment, though there was no Privity. *Vid.* 2 *Vern.* 423.

2. The Plaintiff demands, by his Bill, ſix Years Rent arrear, due from the Defendant, and incurred during the Time, that he, the Plaintiff, was Biſhop of *Exon*; the Defendant pleads, that whilſt he was Biſhop of *Exon*, he tendred him the Rent, which he refuſed, having a Mind to impeach his Leaſe, and that he being now tranſlated, is not intitled to the Rent, either in Law or Equity. The Lord Chancellor was clear of Opinion, that the Plaintiff had no Remedy at (*a*) Law; and with the Advice of the Judges decreed, that he ſhould have none in Equity. 23 *Car.* 2. between the Biſhop of *Sarum* and *Noſworthy*, 2 *Chanc. Rep.* 60.

(*a*) But *Q.* Whether an Action of Debt might not be brought for the Rent at Law.

3. If an Aſſignee of a Leſſee aſſigns it over, Equity will compel him to pay the Rent which became due during his Enjoyment, tho' the Privity of Eſtate was deſtroyed in (*b*) Law. It being urged, that there were twenty Precedents of the Kind; my Lord Chancellor ſaid, that if there were not one, he would not have doubted to have made a Precedent in this Caſe. *Paſch.* 1683. between *Treakle* and *Cook*, 1 *Vern.* 165.

(*a*) An Aſſignee cannot by Aſſigning his Intereſt, diſcharge himſelf of the Rent, without tendring the Arrears, and giving Notice of the Aſſignment; for 'till then he is liable in an Action of Debt. 1 *Lev.* 215. he is likewiſe liable in an Action of Covenant for the Rent due before the Aſſignment. 1 *Salk.* 81. But for Rent which became due after the Aſſignment, he is not liable, though he does not give Notice of the Aſſignment. 1 *Salk.* 81. 2 *Vent.* 228.

4. If a Leſſee of a College makes an Under-Leaſe, and covenants with his Leſſee, that he would renew his Leaſe, and add a further Term of three Years to his Leaſe, and he renews the Leaſe; but inſtead of adding the three Years, he aſſigns it to *J. S. J. S.* having Notice of the Covenant, will be obliged to add the three Years. Decreed between *Finch* and *Earl* of *Salisbury*, *Nel. Chanc. Rep.* 212.

5. So if *A.* makes a Leaſe for three Years, and in Conſideration of the Leſſee's laying out 100 *l.* in Improvements, covenants to grant a new Leaſe at the End of the Term, at the ſame Rent; the Purchaſer of the Inheritance ſhall make good this Covenant. *Mich.* 1703. between *Richardſon* and *Sydenham*, 2 *Vern.* 447.

6. If a Leſſee for Years, with Covenants to repair, aſſigns it to *J. S.* by Way of Mortgage, and *J. S.* never enters, Equity will not compel him to repair, tho' he had the whole Intereſt in him; and tho' it was his own Folly to take an Aſſignment of the whole Term, when he ſhould have taken a derivative Leaſe, by which Means he would not be liable at Law. *Trin.* 1692. between *Sparkes* and *Smith*, 2 *Vern.* 275. but *vid.* 2 *Vern.* 374. where ſuch an Aſſignee, tho' he never entred, and had loſt his Mortgage-Money, was by Law compelled to pay the Rent; and having ſued in Equity, could have no Relief.

7. If a Leſſee for Years, who is bound by Covenant to repair, makes an Under-Leaſe in Truſt for *J. S.* and the Leſſee is dead, and the Premiſſes out of Repair; yet the Leſſor ſhall not compel *J. S.* in Equity to repair, unleſs the Executors of the firſt Leſſee are inſolvent; for tho' the Privity of Eſtate is deſtroyed in Law, yet he ſhall not have Recourſe to this Remedy, whilſt he has any left againſt the Executors of the firſt Leſſee. *Mich.* 1682. between *Goddard* and *Keate*, 2 *Vern.* 17.

CAP. IX.

# CAP. IX.

# Award and Arbitrament.

(A) Concerning the Submiſſion.

(B) The Parties to the Submiſſion.

(C) The Arbitrators or Umpire, and herein of the Commencement and Revocation of their Authority.

(D) The Award, for what Cauſes ſet aſide.

(E) Concerning Submiſſions and Awards made purſuant to a Rule of Court.

## (A) Concerning the Submiſſion.

1. IF two ſubmit themſelves to the Arbitrament of *J. S.* of all Controverſies, *Ita quod, &c. de præmiſſis*, and *J. S.* makes an Award of Part only, ſo that the Award is void in Law; this ſhall not be made good in a Court of Equity. Between *Robinſon* and *Biſs*, adjudged 7 *Jac.* in *B. R.* and a Prohibition granted to the Council of *York*. 1 *Rol. Abr.* 377.

2. So if the Award differs from the Sumbiſſion, it ſhall be as well void in Equity as at Law. 1 *Chanc. Ca.* 186. *Nel. Chanc. Rep.* 141. *S. P.*

3. If the Submiſſion to an Award be (*a*) conditional *ita quod* an Award be made *de & ſuper Præmiſſis, &c.* there, if the Award be not of the Whole, it is void; but if the Submiſſion be not conditional as aforeſaid, then tho' the Award be but of Part of the Matter referred, it is good for ſo much as it ſettles, tho' it leaves other Things at large. *Per* Lord *Maynard*, 2 *Vern.* 109.

(*a*) The Diſtinction which has obtained with Reſpect to conditional Submiſſions, is where the Submiſſion does in general ſet forth all the Matters in Controverſy, with a ſpecial Concluſion requiring, or ſo that the Award be made of all the ſaid Matters; in which Caſe it has been held neceſſary to make a final Determination of all the Particulars enumerated. *Cro. Eliz.* 838. But if there be no ſuch Enumeration nor ſpecial Concluſion, then the Award may be good, though it make an End of Part of the Matters only. 1 *Rol. Abr.* 257. 8 *Co.* 97. *b.* And ſince the Courts of Law and Equity have of late been leſs nice in the Conſtruction of Awards; it is now agreed to be a ſtated Rule in Awards that are conditional, or ſaid to be *de & ſuper præmiſſis*, that if the Words uſed in them be in their own Nature more comprehenſive, and ſo extenſive to Things not within the Submiſſion; yet it ſhall be intended that there was no other Matter between the Parties for them to lay hold on, but what was ſubmitted, if the contrary be not ſhewn; ſo *è converſo*, If the Words are more narrow and leſs comprehenſive than to take in all the Matter of Submiſſion; yet it ſhall be intended that no more was in Controverſy than what the Words naturally comprehend, if the contrary be not likewiſe ſhewn. 6 *Mod.* 232.

## (B) The Parties to the Submiſſion.

1. IF all the Parties to the Suit conſent to refer the Matter to *J. M.* and *J. S.* one of the Parties ſignifies his Conſent, by ſigning a Paper to that Purpoſe, ſo that the Award be made at a certain Day therein limited, and no Award is then made; but afterwards the Court, in the Preſence of all the Parties (except *J. S.* who was abſent) but his Solicitor conſenting on his Behalf, refer it back to *J. M.* but not finally to determine, who made an Award; and it was reſolved, that the Solicitor's Conſent ſhould not bind his Client; tho' it was objected and admitted, that an (*a*) Attorney's Aſſent to a Reference on Behalf of his Client ſhould bind him at Law. Between *Colwell* and *Child*, 1 *Chan. Ca.* 86. 1 *Chan. Rep.* 195. *S. C.*

(*a*) *Vide* 1 *Salk.* 70. And who are bound by their own and others Submiſſions, *vide* 1 *Roll. Abr.* 268. *March* 111. *Stile* 351. 3 *Lev.* 17. If one Partner on Behalf of himſelf and the other Partner ſubmits, &c. though the Partner that did not ſubmit is not bound, yet he who ſubmitted ſhall perform the Award. 2 *Mod.* 227.

2. If *A.* and *B.* Executors of *J. S.* on the one Part, and *C.* his Widow on the other Part, ſubmit to Arbitration, the Arbitrators may make an Award, not only of Matters in Difference between *A.* and *B.* jointly, or *A.* and *B.* ſeparately, and *C.* but alſo of Matters between *A.* and *B.* provided they have Knowledge of the whole Fact, and all the Parties intereſted are before them. Between *Carter* and *Carter*, 1 *Vern.* 259.

## (C) The Arbitrators or Umpire; and herein of the Commencement, Determination and Revocation of their Authority.

1. IF the Submiſſion to an Award be, ſo as the Arbitrators make their Award at or upon the 27th of *March* then next; and if the Arbitrators make no Award then, if the Umpire make his Umpirage on the ſame Day; the Umpire cannot make his Umpirage on the ſame (*b*) Day, tho' the Arbitrators diſagree, for they have all that Day to make their Award. 2 *Vern.* 100.

(*b*) If there be a Submiſſion to Two, ſo as they make their Award before *Midſummer*; and if they cannot agree, then to ſuch Umpire as they chuſe, ſo as he make his Umpirage before *Midſummer*; and an Umpire is choſe accordingly, this is good, and ſo will his Umpirage be, if made; becauſe the Arbitrators had determined their Power before by chuſing an Umpire; but if the Umpire be named in the Submiſſion, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in be expired. *Per Holt* C. J. 1 *Salk.* 71, 72. but for this *vide Cro. Car.* 263. *Raym.* 206. 1 *Lutw.* 544. 2 *Mod.* 169. 2 *Vent.* 116. 1 *Salk.* 70.

2. If by the Submiſſion the Arbitrators have Power to chuſe an Umpire, and they not agreeing throw *Croſs* and *Pile* which of them ſhould name the Perſon; and the Umpire thus choſen makes his Umpirage; the Court will ſet it aſide. 2 *Vern.* 485.

3. If the Parties in Court ſign an Order, by Conſent, to refer their Matters to Arbitrators finally to determine, and their Award to be final, and ſtand ratified by Decree, without any Appeal; yet one of

(*b*) A Submiſſion to an Award by Bond may be countermanded by Deed, ſuch Authorities in their own Nature being revokable, as a Letter of Attorney, &c. tho' made irrevokable by expreſs Words; but in ſuch Caſe the Bond is forfeited; but if it had been without Obligation, one might revoke and forfeit nothing. *Ex nuda ſubmiſſione non oritur Actio.* 8 *Co.* 82.

the Parties may (*b*) revoke this Submiſſion; but in ſuch Caſe the Court will grant an Attachment againſt him. Between *Hide* and *Petit*, 1 *Chan. Ca.* 185.

## (D) The Award, for what Cauſes ſet aſide.

1. UPON a Submiſſion, by Conſent and Order of Court, an Award was made, that a Bond ſhould be given by the Guardian, that the Infant at his full Age ſhould convey the Lands in Queſtion; and *Nottingham* L. C. held, that when the Parties themſelves chuſe their own Judges, this Court will not relieve againſt the Award, unleſs it be in Caſe of Corruption, exceeding Authority, and the like; but when there is a Reference by Order of this Court, and the Award appears unequitable, the Court will not decree it; and in this Caſe, it being unreaſonable that the Guardian ſhould give ſuch a Bond, for the Infant may die, or if he live to Age, may refuſe to convey, and therefore would not decree it; and he ſaid further, that he would never decree an Award to bind an Infant. 1 *Chan. Ca.* 279.

2. If the Arbitrators award a Thing impoſſible, or repugnant, to be done, the Award ſhall be ſet aſide. *Vide* 1 *Chan. Ca.* 87.

3. The Plaintiff called the Defendant, who was a Butcher, *Bankrupt Knave*, which being ſubmitted to Reference, the Arbitrators gave him 495 *l.* to repair his Honour (as they called it in the Award) and the Court thought the Damage too exceſſive, and ſet aſide the Award, but directed a Trial at Law; and the Jury gave him 10 *l.* *Butcher of Croydon*'s Caſe, 3 *Chan. Rep.* 76. 2 *Vern.* 251. *S. C.* cited; where it is ſaid, that the Court did not ſet aſide the Award, barely for exceſſive Damages, but becauſe it appeared that one of the Referees was the Butcher's Couſin.

4. If Tenant for Life commits Waſte to the Value of 380 *l.* and his Eſtate is but 70 *l. per Ann.* and an Action of Waſte is brought againſt him by him in Remainder, and it is ſubmitted to a Reference by Rule of Court; but before an Award made, the Tenant for Life repairs the Places waſted to 40 *l.* and forbids the Arbitrators, and likewiſe the Umpire, to proceed in making any Award; but notwithſtanding the Umpire awards the Party 380 *l.* Yet the Court will not ſet aſide the Award, there appearing no Fraud or Colluſion in the Matter, *Paſch.* 1683. between *Brown* and *Brown*, 1 *Vern.* 157. Although it was objected that 380 *l.* was near the Value of an Eſtate for Life of 70 *l. per Ann.*

5. If the Arbitrators appear to have an Intereſt in the Cargo touching which the Award is made, and therefore put too great a Value thereon; and in five Days after the Award made the Money awarded is attached by the Arbitrators for Debts owing to them; the Court will ſet aſide the Award. *Hill.* 1691. between *Earle* and *Stocker*, 2 *Vern.* 251.

6. If a Submiſſion is to *three* Arbitrators, or any Two of them, and Two of them by Fraud or Force will exclude the other, that a-

lone is ſufficient to vitiate the Award; or if they have private Meetings, and admit one of the Parties, but give no Notice to the other, and ſuffer the Party's Attorney, whom they admitted, to draw up the Award, ſuch Award ſhall be ſet aſide for Partiality and Unfairneſs. *Mich.* 1705. between *Burton* and *Knight*, 2 *Vern.* 514.

7. If it appears that the Arbitrators went upon a plain Miſtake, either as to the Law, or in a Matter of Fact, the ſame is an Error appearing in the Body of the Award, and ſufficient to ſet it aſide. 2 *Vern.* 705. But the Plaintiff failing to make out his Caſe by Proof, his Bill was diſmiſs'd.

8. The Plaintiff and Defendant had ſubmitted to an Arbitrament by Bond; and an Award was made, not binding by Form of Law, by which the Plaintiff was to pay the Defendant 900 *l.* and to ſeal a Releaſe to the Defendant; and the Defendant was to aſſign ſeveral Securities he had from the Plaintiff. The Plaintiff ſold ſome Lands to raiſe the 900 *l.* expecting the Defendant would receive it; and he gave him Intimation he would, and tendered him the 900 *l.* and a Releaſe executed by the Plaintiff; and though there was no other Execution on the Plaintiff's Part of the Award; and tho' the Award was extrajudicial, and not good in Strictneſs of Law; yet the Lord Chancellor decreed it ſhould be performed *in Specie*. *Paſch.* 1687. between *Norton* and *Maſcal*, 2 *Vern.* 24.

9. But where a Bill was exhibited to have an Execution of an Award, which was performed by neither Party; and the Defendant demurred, becauſe there was no Precedent that a Court of Equity had ever carried ſuch Awards into Execution; and the Demurrer was allowed. *Mich.* 1704. at the *Rolls*, between *Biſhop* and *Webſter*.

## (E) Concerning Submiſſions and Awards made purſuant to a Rule of Court.

1. IF an Award is made a Rule of Court, according to a Submiſſion for that Purpoſe, and an Attachment is taken out for not obeying the Award, and then the Party dies againſt whom the Attachment iſſues; the (*a*) Act of Parliament directing it to be carried on by Attachment, as is done in other Courts, for diſobeying a Rule of Court; by the Death of the Party, the Attachment is gone, and the Remedy loſt. *Mich.* 1703. between *Webſter* and *Biſhop*, 2 *Vern.* 444.

(*a*) By the 9 & 10 *W.* 3. *cap.* 15. The Parties may agree, that their Submiſſion to the Award, or Umpirage of any Perſon or Perſons, ſhall be made a Rule of any of his Majeſty's Courts of Record, and may inſert ſuch their Agreement in the Condition of their Bond, *&c.* and a Rule of Court ſhall thereupon be made, that the Parties ſhall be concluded by ſuch Arbitrament or Umpirage; and in Caſe of Diſobedience thereto, the Party neglecting or refuſing ſhall be ſubject to all the Penalties of Contemning a Rule of Court, unleſs it appears on Oath, that ſuch Award was corruptly and unduly procured; in which Caſe it ſhall be ſet aſide by any Court of Law or Equity, *&c.* *Provided* that this Statute ſhall extend only to ſuch Matters for which there is no Remedy, but by Perſonal Action or Suit in Equity.

2. If an Award is made purſuant to an Order of Court, the Party ought firſt to move the Court to confirm the Award, as is done upon a Maſter's Report, and either Side is at Liberty to except to it. 1 *Vern.* 469.

3. If there be a Submiſſion to a Reference by Order of Court, and the Award to be made to be confirmed by the Decree of the Court, without Appeal or Exception; yet Exceptions to the Award will be admitted; ruled upon Debate. 2 *Vern.* 109.

CAP. X.

# CAP. X.

# Bankrupt.

(A) Concerning the Commiſſion and Commiſſioners.
(B) What ſhall be deem'd the Bankrupt's Eſtate, or ſuch an Intereſt in him as the Commiſſioners may aſſign.
(C) Who may be allowed to come in as Creditors.
(D) Who are obliged to come in as Creditors.

## (A) Concerning the Commiſſion and Commiſſioners.

1. THE Granting a Commiſſion of Bankruptcy is not a Matter diſcretionary, but *de Jure*; for tho' the Words of the Act of Parliament are, that the Chancellor may grant, yet that *may* was in Effect *muſt*. *Per North* L. K. Alderman *Backwell's* Caſe, 1 *Vern.* 152. And ſo he ſaid it had been reſolved by all the Judges.

2. But though the Granting a Commiſſion be *ex Officio*, yet it muſt be at the Requeſt of Perſons intereſted; for if Twenty ſwear that *J. S.* is a Bankrupt, yet a Commiſſion cannot be awarded without a Petition for that Purpoſe. *Per North* Lord Keeper, *Backwell's* Caſe, 2 *Chan. Ca.* 190.

3. If all the Creditors, who petitioned for a Commiſſion, ſhould agree to have it diſcharged or ſuperſeded, it may be granted. 1 *Vern.* 209. *Per Jefferies* Lord Chancellor; and if other Creditors who were not Petitioners, ſhould pray a Renewal of the Commiſſion, or a Revocation of the *Superſedeas*; *Q.* if it may not be granted, eſpecially if the *Superſedeas* was within four Months after the Granting the Commiſſion. *Vide* 2 *Chan. Ca.* 192, 193. 1 *Vern.* 208.

4. If a Commiſſion is granted, and the Bankrupt dies, yet the Commiſſioners may proceed. 2 *Chan. Ca.* 193.

5. If the King dies, the Commiſſion abates, but a new Commiſſion may be taken out, and the Commiſſioners ſhall proceed from where they left off. 2 *Chan. Ca.* 193.

6. If a Creditor offers Proof of his Debt to the Commiſſioners, which they diſallow, and Diſtribution is not made, my Lord Chancellor will hear the Proof, and give Order therein; tho' he ſaid at firſt, that it was fit to leave it to the Courſe the Statute had provided. 1 *Chan. Ca.* 275.

7. If one is examined by the Commiſſioners touching the Bankrupt's Eſtate; yet he may be re-examined in Chancery. 1 *Chan. Ca.* 73.

8. If the Commiſſioners make a fraudulent Diſtribution of the Bankrupt's Eſtate, it may be ſet aſide in Chancery, even on a Petition. *Per Trevor* and *Hutchins* Lords Commiſſioners, 2 *Vern.* 162.

9. But it ſeems a Diſtribution by the Commiſſioners among the Creditors, upon a ſuppoſed Value of the Bankrupt's Real Eſtate, where the Commiſſioners had no Money to diſtribute, is not fraudulent, and not to be ſet aſide. *Vide* 2 *Vern.* 158.

## (B) What ſhall be deem'd the Bankrupt's Eſtate, or ſuch an Intereſt in him as the Commiſſioners may aſſign.

1. IF a Leſſor covenants with his Leſſee and his Aſſigns, to renew his Leaſe, and the Leſſee becomes a Bankrupt, and the Commiſſioners aſſign this Covenant, the Aſſignee cannot have any Relief againſt the Leſſor: Adjudged, upon a Reference to J. *Windham* and B. *Turner*; and the Bill of the Aſſignee diſmiſſed accordingly. *Hill.* 17 *Car.* 2. between *Drake* and the Mayor of *Exeter*, 1 *Chan. Ca.* 71. 2 *Vern.* 97. *S. C.* cited.

2. But the Commiſſioners may aſſign an Equity of Redemption; 1 *Chan. Ca.* 71. 2 *Vern.* 97. *S. P. Per Cur'*, The Clauſe in the Statute being, that the Aſſignee may perform Conditions not broken, and Conditions performable.

3. If *A.* deviſes 800 *l.* to be inveſted in Land, for the Benefit of the Wife of *J. S.* for her Life, and afterwards for her Children; and the Intereſt of the Money in the mean Time to go to ſuch Perſons as ought to receive the Profits, and *J. S.* becomes a Bankrupt, the Intereſt of this 800 *l.* ſhall not be liable to the Bankruptcy, this not being any Truſt created by the Bankrupt, but a Maintenance intended the Wife, and given to her by her Relation. *Paſch.* 1689. between *Vandenanker* and *Desbrough*, 2 *Vern.* 96.

4. If the Father, on his Son's Marriage, covenants during his Life, to pay his Son 15 *l. per Ann.* and the Son becomes a Bankrupt, his Creditors ſhall not have the Benefit of this Agreement. *Mich.* 1690. between *Moyſes* and *Little*, 2 *Vern.* 194.

5. But if a Father deviſes a Legacy of 600 *l.* to his Son, payable at twenty-one, and the Son obtains a Decree for it, and 637 *l.* is reported due; but before the Money is paid, the Son becomes a Bankrupt; yet the Commiſſioners may aſſign the Legacy and Benefit of the Decree; ruled upon a Demurrer. *Hill.* 1701. between *Toulſon* and *Grout*, 2 *Vern.* 432.

6. A Man had deviſed Lands which were in Mortgage, to be ſold, and the Surplus of the Money to be paid to his Daughter; the Daughter married a Man, who ſoon after became a Bankrupt, and the Commiſſioners aſſigned this Intereſt of the Wife's; the Husband died, and the Aſſignees brought this Bill againſt the Wife and Truſtees, to have the Land ſold, and the Surplus of the Money paid to them; but the Court would not aſſiſt in ſtripping the Wife (who was wholly unprovided for) of this Intereſt, but diſmiſs'd the Bill. *Mich.* 1698. at the *Rolls*, between *Parker* and *Dykes*.

7. A Legacy of 1000 *l.* was given to one, after the Death of her Mother, when ſhe ſhould attain the Age of twenty-one Years; and the Defendant was appointed Truſtee for the Raiſing and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one, who ſoon after became a Bankrupt, and the Commiſſioners aſſigned all his Effects, and gave him a Certificate of his Conformity; and the Aſſignees brought a Bill againſt the Truſtee for this 1000 *l.* who inſiſted, that the Aſſignees could be in no better Condition than the Husband; and that if he were Plaintiff he could not prevail, without making a ſuitable Proviſion on his Wife; and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother, and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy, was not ſuch an Intereſt as could be aſſigned: The Court held, that though both Contingencies have ſince happened; yet thoſe being ſince the Aſſignment of the Bankrupt's Eſtate, and ſince a Certificate of his having conformed himſelf in every Thing to the Acts, he was now diſcharged as a Bankrupt; and this Portion could not paſs without a new Aſſignment, which the Commiſſioners could not make, their Commiſſion being determined, and ſo diſmiſſed the Bill. *Mich.* 1717. between *Jacobſon* and *Peer Williams*.

## (C) Who may be allowed to come in as Creditors.

1. IF one lends Money to a Bankrupt, after a Commiſſion ſued out againſt him, but before actual Notice of it, He cannot come in under the Statute as a Creditor; By two Lords Commiſſioners againſt one. 2 *Vern.* 156. A Debt voluntarily paid a Bankrupt ſhall be paid over again; *ſecus* if recovered by due Courſe of Law. 1 *Vern.* 94. *but for this* vide *Title* Notice.

2. *A.* on his Marriage, gives a Bond to leave his Wife 500 *l.* or a Third of his perſonal Eſtate, at her Election; *A.* becomes a Bankrupt; and it was decreed, that the Wife ſhould come in as a Creditor on her Bond; and what ſhall be paid in Reſpect thereof, to be put out to Intereſt, which is to be received by the Creditors, during the Bankrupt's Life, and the Principal to be paid the Wife, if ſhe ſurvives him. *Trin.* 1710. between *Holland* and *Calliford*, 2 *Vern.* 662.

3. But where a Bond was given by the Husband, for Payment of a Sum of Money to his Wife, in Caſe ſhe ſurvived him, and the Husband after became a Bankrupt: And *per* Lord Chancellor, there can be nothing ſtopped, by Way of Dividend, out of the Bankrupt's

Eſtate, to anſwer this contingent Debt or Demand, when it happens; but where a Bottomree Bond was entered into, and the Ship returned ſafe before the Devidend actually made, they were let into a Share of that Dividend, tho' the Bond was contingent at firſt, becauſe the Contingency was then at an End. *Mich.* 1728. *ex parte Chawell* verſus *Caſſanet*.

4. *A.* and *B.* enter into Partnerſhip, and by Indenture of Copartnerſhip agree, that all ſuch Debts, as ſhould be owing on the Joint Account, ſhould be paid out of the Joint-Stock, and that the Joint-Stock ſhould not be charged with the private or particular Debts of either of the ſaid Partners. *A.* and *B.* became Bankrupts, and a joint Commiſſion was taken out againſt them; and the Commiſſioners having aſſigned all their Eſtate to the Creditors on the Joint-Stock; *J. S.* who was a ſeparate Creditor to one of them, brought his Bill to be admitted into a Share; and it was declared by the Court, that the Eſtate belonging to the joint Trade, as alſo the Debts due from the ſame, ought to be divided into Moieties, and that each Moiety of the Eſtate ought to be charged, in the firſt place, with a Moiety of the joint Debts; and if there be enough to pay all the Debts belonging to the joint Trade, with an Overplus, then ſuch Overplus ought to be applied to pay particular Debts of each Partner; but if ſufficient ſhall not appear to pay all the joint Debts; and if either of the Partners ſhall pay more than a Moiety of the joint Debts, then ſuch Partner is to come in before the Commiſſioners, and be admitted as a Creditor for what he ſhall ſo pay over and above his Moiety; and decreed accordingly. 34 *Car.* 2. between Lord *Craven & al'* and *Knight & al'*, 2 *Chan. Rep.* 226. 2 *Chan. Ca.* 139. *S. C.* and only there ſaid, that the ſeparate Creditor was admitted, notwithſtanding the Agreement of the Parties.

5. *A. B.* and *C.* were Partners in the Trade of a *Dry Salter*, *C.* imbezils and waſtes the Joint-Stock, contracts private Debts, and becomes a Bankrupt; the Commiſſioners aſſign the Goods in Partnerſhip; on a Bill brought by the other Partners, they inſiſted to have an Account, and the Goods ſold, that out of the Produce of the Goods, the Debts owing by the joint Trade might be paid in the firſt place; and that out of *C.*'s Share Satisfaction may be made for what *C.* waſted; and that the Aſſignees could be in no better Caſe than the Bankrupt himſelf, and were intitled only to what his third Part would amount unto clear, after Debts paid and Deductions for his Imbezilment; and the Court ſeemed to be of that Opinion, but ſent it to a Maſter to take the Account and ſtate the Caſe. *Trin.* 1693. between *Richardſon* and *Goodwin*, 2 *Vern.* 293.

6. *A.* and *B.* being joint Traders, a Commiſſion of Bankruptcy iſſued againſt them; their ſeparate Creditors now applied by Petition, that they might be let in for their Debts, upon the reſpective ſeparate Eſtates of the Bankrupts, under that joint Commiſſion, the ſeparate Eſtates being of ſmall Value, and would not bear the Charge of taking out two new Commiſſions againſt them ſeparately; and the Lord Cnancellor ordered them to be let in to prove their reſpective ſeparate Debts upon the joint Commiſſion, they paying Contribution to the Charge of it, and directed, as the Joint or Partnerſhip Eſtate was in the firſt place to be applied to pay the Joint or Partnerſhip Debts, ſo in like Manner the ſeparate Eſtate ſhould be

be, in the firſt place, to pay all the ſeparate Debts; and as ſeparate Creditors are not to be let in upon the joint Eſtate, until all the joint Debts are firſt paid; ſo likewiſe the Creditors to the Partnerſhip ſhall not come in for any Deficiency of the joint Eſtate, upon the ſeparate Eſtate, until the ſeparate Debts are firſt paid. *Mich.* 1715. *ex parte Crowder*, 2 *Vern.* 706.

## (D) Who are obliged to come in as Creditors.

1. IF *A.* ſells Land to *B.* who afterwards becomes a Bankrupt, and Part of the Purchaſe-money is not paid, *A.* ſhall not be bound to come in as a Creditor, under the Statute, but the Land ſhall ſtand charged with the Money unpaid, tho' no Agreement for that Purpoſe. Between *Chapman* and *Tanner*, 1 *Vern.* 267.

2. If *A.* being beyond Sea, conſigns Goods to *B.* then in good Circumſtances in *London*, and before the Goods arrive, *B.* becomes a Bankrupt, whereupon *A.* conſigns them to another; and the Aſſignees of the Commiſſion pray Relief, and a Diſcovery; and a Trial at Law is directed, whether ſuch Conſignment veſted a Property in *B.* and a Verdict is found for the Aſſignees; yet Equity will not oblige them to come in as Creditors, it being allowable by any Means to prevent the Goods coming into the Hands of *B.* or the Aſſignees. *Hill.* 1690. between *Wiſeman* and *Vandeput*, 2 *Vern.* 203.

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## CAP. XI.

# CAP. XI.

# Baron and Feme.

(A) What Things are veſted in the Husband by the Marriage.

(B) What Acts of the Wife's before Marriage ſhall the Husband avoid, as done in Derogation of the Rights of Marriage.

(C) How far the Husband ſhall be bound by the Wife's Acts before Marriage.

(D) How far by her Acts during Coverture.

(E) How far a Feme Covert ſhall be bound by the Acts in which ſhe was joined with her Husband.

(F) What Contracts between Husband and Wife are diſſolved by the Marriage.

(G) In what Caſes the Husband muſt make a ſuitable Proviſion on his Wife, when he ſues for her Fortune.

(H) Suits and Proceedings by and againſt Husband and Wife, how to be.

(I) Concerning the Wife's Pin-Money and Paraphernalia.

(K) Concerning Alimony and ſeparate Maintenance.

(L) What Right ſurvives to either of them by the Diſſolution of the Marriage.

## (A) What Things are veſted in the Husband by the Marriage.

1. A Feme Sole having aſſigned her Term in Truſt for herſelf, before Marriage, the Husband alone mortgages the Term; and it was decreed, that ſuch Mortgage was not good; and it was likewiſe admitted by the Court to be the conſtant Practice, ſince Queen *Elizabeth*'s Time, to ſet

aſide and fruſtrate all Incumbrances and Acts done by the Husband, with Reſpect to the Wife's Term, in Truſt for her, and that he could neither charge nor grant it. *Per Finch* Lord Keeper, 25 *Car.* 2. between *Doyly* and *Perſull*, 1 *Chanc. Ca.* 225. *But the Law is now changed in this Particular.*

2. For where *A.* having diſpoſed of a Term ſettled in Truſt on his Wife by a former Husband; tho' it was decreed void by *Finch*, *Lord Keeper*, yet upon an Appeal to the Houſe of Lords, the Decree was reverſed. Sir *Edward Turner*'s Caſe, 1 *Vern.* 7.

3. It came afterwards in Queſtion, upon an Aſſignment made by the Husband of ſuch a Term, whether he could diſpoſe of it; and it being urged that it had been lately adjudged in the Houſe of Lords, that he might, my Lord Chancellor wondered at that Reſolution, which he ſaid would not amount to an Act of Parliament, ſo as to change the Law; but at laſt decreed ſuch Diſpoſition good, ſaying, there muſt not be one Kind of Equity above Stairs, and another here; and thought that from henceforth it would not be ſufficient to have the Husband's Conſent and Privity to an Aſſignment of a Term in Truſt for the Feme, before Marriage, unleſs he was likewiſe made a Party to the Aſſignment. *Mich.* 1681. between *Pit* and *Hunt*, 1 *Vern.* 18.

4. A Term being ſettled in Truſt on the Wife by a former Husband, the ſecond Husband firſt mortgages it, and then he and the Mortgagee aſſign it to *J. S.* who brought a Bill againſt the Wife and her Truſtees, to have the legal Eſtate aſſigned over to him; and it was held, that the Husband may as well diſpoſe of a Term in Truſt for the Wife, as if the legal Eſtate was in her; and decreed accordingly, altho' the Husband had made no Settlement on the Wife. *Trin.* 1692. between *Tuder* and *Samyne*, 2 *Vern.* 270.

5. *A.* made a Settlement, whereby he created a Term for Years in Truſt, to raiſe 400 *l.* a-piece for his two Daughters; one of them marries *B.* and he and his Wife brought a Bill, and had a Decree to have the 400 *l.* raiſed and paid; but before it was raiſed, *B.* aſſigns the Benefit of this Decree to one *J. S.* in Truſt for Payment of his Debts, and made him Executor, and died, leaving his Wife and one Child unprovided; the Creditors brought a Bill to have the Benefit of the ſaid Aſſignment; and tho' it was inſiſted upon, in Behalf of the Wife, that there was a Difference between a Term in Truſt to raiſe a Sum of Money for a Woman, and a Truſt of the Term it ſelf for a Woman; yet the Maſter of the *Rolls* held, that this was a Term for Years, and not a Sum of Money, and therefore not to be diſtinguiſhed from Sir *Edward Turner*'s, and muſt decree it (though againſt his Conſcience) that there may be an Uniformity of Judgments. *Trin.* 1703. between *Walter* and *Saunders*; *but for this* vid. *Letter* (L).

6. If a Legacy be given to a Feme Covert, who lives ſeparate from her Husband, and the Executor pays it to the Feme, and takes her Receipt for it; yet on a Bill brought by the Husband againſt the Executor, he ſhall pay it over again, with Intereſt; for Payment to the Wife is not good. Decreed *Mich.* 1684, between *Palmer* and *Trevor*, 1 *Vern.* 261.

7. *A.* deviſes the Surplus of his Perſonal Eſtate to his Daughter, the Wife of *B.* for her ſeparate Uſe, and makes her Executrix; and my Lord *Chancellor* ſeemed to be of Opinion, that the Deviſe being

to her, and not to Truſtees, that what comes to her by Law belongs to the Husband; but there was no Decree made in it. 2 *Vern.* 659.

## (B) What Acts of the Wife's before Marriage ſhall the Husband avoid, as done in Derogation of the Rights of Marriage.

1. A Widow makes a Deed of Settlement of her Eſtate, and marries a ſecond Husband, who was not privy to ſuch Settlement; and it appearing to the Court, that it was in Confidence of her having ſuch Eſtate that the Husband married her, the Court ſet aſide the Deed as fraudulent. Between *Howard* and *Hooker*, 2 *Chanc. Rep.* 81.

2. So where the intended Wife, the Day before her Marriage, entred privately into a Recognizance to her Brother, and it was decreed to be delivered up. 2 *Chanc. Rep.* 79.

3. So where a Conveyance was made by the Wife, before her Marriage, to Truſtees, in Truſt that they ſhould permit her to receive the Rents and Profits of the Eſtate, and Act in every Thing as ſhe, whether ſole or covert, ſhould appoint; the Lady being crazed in her Underſtanding endeavoured to run away from her Husband, and ſtirred up her Creditors to ſue him; and the Conveyance appearing to be without the Husband's Privity, my Lord *Chancellor* held it to be in Derogation of the Rights of Marriage, and decreed the Poſſeſſion of the Eſtate to the Husband, and a Conveyance from the Truſtees to the *Six Clerks*, that it might be ſubject to the Order of the Court. *Hill.* 1686. between *Carlton* and Earl of *Dorſet*, 2 *Vern.* 17.

4. A Woman on Agreement before Marriage with her Husband, being to have a Power to act as a Feme Sole, and the Husband dying, and ſhe marrying again, the ſecond Husband not being privy to the Settlement on the firſt Marriage; it was decreed that the ſecond Husband ſhould not be bound by that Settlement made on the former Marriage. Between *Edmonds* and *Dennington*, a Caſe cited to be decreed, 2 *Vern.* 17.

5. But where a Widow, before her Marriage with a ſecond Husband, aſſigned over the greateſt Part of her Eſtate to Truſtees, in Truſt for Children by her former Husband; and tho' it was inſiſted, that this was without the Privity of the Husband, and done with a Deſign to cheat him; yet the Court thought that a Widow may thus provide for her Children, before ſhe put herſelf under the Power of a Husband; and it being proved that 8000 *l.* was thus ſettled, and that the Husband had ſuppreſſed the Deed, he was decreed to pay the whole Money, without directing any Account. *Mich* 1689. between *Hunt* and *Mathews*, 1 *Vern.* 408.

(C) How

## (C) How far the Husband ſhall be bound by the Wife's Acts before Marriage.

1. *A.* Made a Settlement of Lands for the Payment of his Debts, and the Truſtees never acting, his Wife after his Death enters and takes the Profits, and marries again, and ſhe and her Husband continue to take the Profits, and he likewiſe dying, ſhe marries another, who alſo continues to take the Profits; and a Creditor being unſatisfied, it was decreed by the Maſter of the *Rolls*, that the laſt Husband ſhould anſwer, not only for the Profits received by himſelf, and Wife whilſt ſole, but likewiſe for what was received by the ſecond Husband, and not the Heir at Law; and of the ſame Opinion was my Lord *Chancellor*. Between *Gilpin* and *Smith*, 1 *Chanc. Ca.* 80. *but he referred it to the Parties to moderate the Matter.*

2. If a Man marries an Executrix, he ſhall anſwer for ſo much of the Perſonal Eſtate as ſhe poſſeſſed, although he took it as a Portion with her; and this not only in Favour of Creditors, but likewiſe of an Heir. *Paſch.* 1688. between *Bachelor* and *Bean*, 2 *Vern.* 61.

3. But if a Feme Adminiſtratrix waſtes the Aſſets, and then marries, and dies, the Husband is liable to no more than the Value of what came to his or his Wife's Hands after the Marriage. Decreed *Mich.* 1689. between *Sanderſon* and *Crouch*, 2 *Vern.* 118.

4. If the firſt Husband and Wife are guilty of a *Devaſtavit*, and there is a Bond-Debt due: *Per Cur'*, This makes ſuch a Lien by the Deed, that the ſecond Husband is bound; but where there is barely a Breach of Truſt, or a Debt by ſimple Contract, there, in Equity, the Plaintiff ought to follow the Eſtate of the Wife in the Hands of the Executor of the firſt Husband. *Hill.* 1684. between *Norton* and *Sprig*, 1 *Vern.* 309.

5. A Feme Sole bought Goods, but did not pay for them, ſhe afterwards married, and dying, the Goods came to the Husband's Hands; the Creditor who ſold the Goods, brought a Bill againſt the Husband for a Diſcovery; to which the Husband demurred; and the Demurrer was over-ruled by my Lord Chancellor, who with ſome Earneſtneſs ſaid, he would change the Law in that Point. 25 *Car.* 2. between *Freeman* and *Goodham*, 1 *Chanc. Ca.* 295.

6. But it has been ſince held, that where a Man married a Woman Trader, who died, and at her Death was indebted to ſeveral Perſons for Wares which ſhe had bought of them, and which were by her in *Specie* at the Time of her Death, and came to the Hands of her Husband; that tho' a Bill be brought againſt him, that he may either pay for thoſe Goods, or let the Perſons have them again; yet he may inſiſt, that he is neither Executor nor Adminiſtrator to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law; ruled upon Demurrer. *Trin.* 1700. between *Blackmore* and *Ley*; but *Q.*

7. The Defendant had married an Adminiſtratrix to her former Husband, to a Share of whoſe Perſonal Eſtate the Plaintiff was intitled; the Adminiſtratrix was likewiſe intitled to a Third, and before her ſecond Marriage had waſted great Part of the Eſtate, and then

died; and this Bill was brought againſt her Husband, to have an Account of the Eſtate, and a Satisfaction for his Share; and being heard at the Rolls, an Account was decreed to be taken of what of the Eſtate had come to the Hands of the Adminiſtratrix before her ſecond Marriage; and the Plaintiff to have a Satisfaction againſt the Defendant abſolutely, for ſo much as came to his or his Wife's Hands after Marriage, and for what came to her Hands before her ſecond Marriage, to have Satisfaction againſt the Defendant, ſo far as he had any Eſtate of his Wife's; and this Decree was affirmed by my Lord *Chancellor*. *Paſch.* 1706. between *Powell* and *Bell*; and it was ſaid to have been ſeveral Times held, that where a Man marries a Woman, without ſtipulating for any particular Fortune, or making any Settlement; if after the Death of the Wife, Debts of hers appear, the Husband not being a Purchaſer, in ſuch Caſe ſhall be anſwerable for the Debts of the Wife in Equity, as far as he had any Money or other Perſonal Eſtate of hers.

## (D) How far by her Acts during Coverture.

1. THE Wife received Money due on a Bond entred into by one to her Husband; ſhe uſually received and paid Money for him; and the Husband having got Judgment on the Bond, he was ordered to acknowledge Satisfaction thereupon. 15 *Car.* 2. between *Seabourn* and *Blackſtone*, 1 *Chanc. Ca.* 38.

2. Several Goods were deviſed to *A.*'s Wife for Life, and after her Deceaſe to *B.* In this Caſe, tho' *A.* and his Wife were parted, and there had been great Suits for Alimony; and ſhe, during the Separation, had waſted the Goods; yet the *Lord Keeper* thought it reaſonable that the Husband ſhould be charged for this Converſion of the Wife's, *B.*'s Title being Paramount the Feme's, and not under her. *Hill.* 1682. between Lord *Paget* and *Read*, 1 *Vern.* 143.

3. If the Wife, whilſt ſhe lives ſeparate from her Husband, and has a ſeparate Maintenance, buys Goods of Tradeſmen who know of the Separation and Maintenance, they cannot ſue the Executors of the Husband for theſe Goods, neither will Equity give the Executors any Relief, becauſe they have a very good Defence at Law. *Mich.* 1682. between *Ferrars* and *Ferrars*, 1 *Vern.* 71.

## (E) How far a Feme Covert ſhall be bound by the Acts in which ſhe has joined with her Husband.

1. IF a Man ſeiſed in Tail, for valuable Conſideration, bargains and ſells to another in Fee, and covenants that he and his Wife will levy a Fine for better Aſſurance; and it is agreed, that 30 *l.* Part of the Conſideration-Money, ſhall be paid unto the Feme, upon the Conuzance of the Fine by the Baron and Feme; and after the Baron and Feme acknowledge a Fine before a Judge in the Circuit, in the Vacation; and the ſaid 30 *l.* is paid to the Feme, the Baron being ſick a-bed, and the Baron dies before the Term, and thereupon the Feme ſtops paſſing the Fine, and after brings a Writ

of Dower; the Bargainee ſhall have no Remedy in Equity againſt the Dower, becauſe it is againſt a Maxim in Law, that a Feme Covert ſhould be bound without a Fine. *Mich.* 5 *Car.* 1. between *Hody* and *Lun*, 1 *Roll. Abr.* 375. but *Q.*

*Sed v. Atkins 617 where it is ſ. p. ſo Feme was made in this Case.*

2. For if a Feme Covert, by Agreement made with her Husband, is to ſurrender or levy a Fine, tho' the Husband die before it be done, the Court will, by Decree, compel the Woman to perform it. *Per Cur'*, between *Baker* and *Child*, 2 *Vern.* 61.

3. If Baron and Feme levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 *l.* and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage-Money, but afterwards borrows as much more of the Mortgagee as he had paid in before; the Mortgagee having the Eſtate in Law in him by the Forfeiture of the Mortgage, ſhall hold the Land againſt the Heir of the Wife until the whole Money is paid; and if the Heir will not pay Principal, Intereſt and Coſts, he muſt be foreclоſed. Decreed, *Paſch.* 1682. between *Reaſon* and *Sacheverell*, 1 *Vern.* 41.

4. The Earl of *Huntingdon*, and the Counteſs *Eliz.* his firſt Wife, the Mother of the preſent Earl, join in a Mortgage of her Inheritance for 4500 *l.* to pay for the Place of Captain of the *Band* of *Penſioners*, and ſubject to the Mortgage, which was for a Term for Years; the Eſtate was ſettled to Counteſs *Elizabeth* for Life, Remainder to the now Plaintiff, her Son, in Tail; and the late Earl, in the Mortgage Deed, covenants to pay the Money; and the Proviſo was, that on Payment of the Mortgage-Money the Term was to ceaſe; the Mortgage was ſeveral Times aſſigned, and particularly in 1683, and the Counteſs joined in it; and there the Proviſo was, that on Payment of the Money by them, or either of them, the Mortgage-Term was to be aſſigned, as they, or either of them, ſhould direct or appoint. The Mortgage bore Date, *Aug.* 1. 1682. on the 5th of the ſame *Auguſt*, the late Earl by Letter, thanked the Counteſs, for having ſealed the Mortgage; and added, that the Profits of the Office ſhould be religiouſly applied to pay off the Incumbrance; but yet afterwards, when Money came to be paid in, he paid off the Mortgage, but took an Aſſignment thereof in Truſt for himſelf, and by Will deviſed his Perſonal Eſtate to the Defendant, the Counteſs, his ſecond Wife, and the Benefit of this Mortgage. The Plaintiff's Bill was to have the Mortgage aſſigned to him; but the Lord Keeper declared, he could not decree for the Plaintiff; but upon the uſual Terms of Redemption, on Payment of Principal, Intereſt and Coſts, diſcounting Profits; but upon Appeal to the *Lords*, the Plaintiff obtained a Decree to have the Mortgage aſſigned to him. *Paſch.* 1702. between the Earl and Counteſs of *Huntingdon*, 2 *Vern.* 436, 437.

5. If the Wife joins with her Husband in a Fine, to raiſe 400 *l.* by Mortgage of her own Eſtate, to buy a Place for her Husband, and the Husband dies, this ſhall be conſidered as a Debt due from the Husband, and ſhall be paid out of his Perſonal Eſtate if there be enough to pay all his other Debts. *Mich.* 1714. between *Tate* and *Auſtin*, 2 *Vern.* 689.

6. If a Man marries a Woman, who has a Jointure in ſome Houſes which are burnt down, and they, on a Fine levied by them of the Houſes, borrow 1500 *l.* to rebuild them, and by Deed between the

Husband and Conuſee only, the Equity of Redemption is reſerved to the Husband and his Heirs, and he lays out 3000 *l.* in Building; the Wife, ſhe being no Party to the Deed, by which the Redemption was reſerved to the Husband, ſhall redeem, and not the Heir of the Husband. Decreed by *Nottingham* L. C. and affirmed by *North* L. K. *Hill.* 35 *Car.* 2. between *Brend* and *Brend*, 1 *Vern.* 213.

7. If a Feme Covert agrees to ſell her Inheritance, ſo as ſhe might have Part of the Money, and the Land is ſold, and her Part of the Money is put into Truſtees Hands, this Money ſhall not be liable to the Husband's Debts, altho' ſhe afterwards agreed it ſhould be liable. Decreed between *Rutland* and *Molineux*, 2 *Vern.* 64.

## (F) What Contracts between Husband and Wife are diſſolved by the Marriage.

1. IF the Husband and Wife by Deed agree before Marriage, that the Wife ſhall have Power to diſpoſe of her Eſtate as ſhe pleaſes, during the Coverture, and the Deed is put into the Hands of *J. S.* her former Agent, who, during the Coverture, pays the Rents and Profits to the Husband, with the Wife's Approbation, *J. S.* ſhall not be anſwerable for what he had received and paid to the Husband during Coverture; for the Agreement being between the Husband and Wife only, it determined by the Marriage. Decreed *Paſch.* 15 *Car.* 2. between *Darcy* and *Chute*, 1 *Chanc. Ca.* 21. *but* Q. *of this Reaſon.*

2. An Agreement was made between the Husband and Wife, and others on her Behalf, before Marriage, that ſhe ſhould diſpoſe of her Goods, *&c.* as ſhe pleaſed; and the Husband dying, the Queſtion was, whether they belonged to her, or ſhould go to the Executors of the Husband, the Marriage being an Extinguiſhment of the Agreement; but there is no Reſolution. 1 *Chanc. Ca.* 117. 1 *Vern.* 408. *S. P.* But no Reſolution; and the Covenant or Agreement there ſaid to be with the intended Wife only.

3. A Man entred into Articles with his intended Wife, to ſettle certain Lands on her, *&c.* the Marriage is ſolemnized, and the Huſband died before any Settlement made; yet it was decreed, that the Heir of the Husband ſhould execute the Agreement, though it was urged, that the Marriage was a Waver of the Benefit of it, and a Releaſe in Law. *Mich* 30 *Car.* 2. between *Haymer* and *Haymer*, 2 *Vent.* 343.

4. The Plaintiff being Executrix and Reſiduary Legatee of her former Husband, lends 100 *l.* to *A.* and *B.* and took a Note for it in her own Name, and a Bond in a Truſtee's Name, and after marries *B.* one of the Obligors; and it was held that the Bond was not extinct. *Paſch.* 1693. between *Cotton* and *Cotton*, 2 *Vern.* 290.

5. A Man entred into a Bond, conditioned to leave his intended Wife 1000 *l.* the Husband mortgages his Eſtate, and died; and it was decreed, that tho' the Bond was by Law void, being extinguiſhed by the Marriage, yet it ſhould be made good in Equity; and that the Wife may redeem and hold the Land till ſhe was ſatisfied her Debt. *Hill.* 1704. between *Acton* and *Pierce*, 2 *Vern.* 480.

(G) In

## (G) In what Cases the Husband muſt make a ſuitable Proviſion, when he ſues for her Fortune.

1. A Man ſued in the Spiritual Court for his Wife's Portion, and the Court of Chancery granted an Injunction to ſtay Proceedings till ſuch Time as he had made a competent Jointure. *Toth.* 114.

2. So where *A.* married the Legatee and Executrix of *J. S.* who, together with his Wife, demanded 200 *l.* due by Bond to the Teſtator; the Defendant confeſſed the Debt, but inſiſted, that the Husband not having made any Proviſion or Settlement on his Wife, was not intitled to the Money; and the Court declared, that the Security ſhould remain as it was till ſuch Time as the Husband ſhould make a ſuitable Proviſion, or till further Order from the Court. *Nel. Chan. Rep.* 377. The ſame Thing ordered, *Skin.* 288. admitted to be the conſtant Practice, 2 *Vern.* 494.

3. But if the Husband and Wife demand the Execution of a Truſt of a Real Eſtate deviſed by Will, for the Benefit of the Wife, it muſt be decreed according to the Will, for the Wife is *Ceſtui que Truſt*, who, when ſhe has Execution, may diſpoſe of it as ſhe pleaſes; but in Caſe of a Perſonal Demand, my Lord Chancellor ſaid, the Court may impoſe Terms on the Husband. *Mich.* 1708. between *Lupton* and *Tempeſt*, 2 *Vern.* 626.

4. An Infant intitled to the Truſt of Lands in Fee by a collateral Anceſtor, marries without her Father's Conſent, and the Father brings a Bill againſt the Husband and Wife and her Truſtees, that a Proviſion might be made on her out of thoſe Lands; the Husband and Wife demur to the Bill; and the Demurrer was allowed; for it appears by the Plaintiff's own Shewing, that he has no Right either in Law or Equity to the Lands: But my Lord Chancellor ſaid, that if the Husband had been Plaintiff, and had been ſeeking any Favour from the Court, he could then make him do what was reaſonable. *Paſch.* 34 *Car.* 2. between *Micoe* and *Powell*, 1 *Vern.* 39.

## (H) Suits and Proceedings againſt Husband and Wife, how to be.

1. A Legacy was given to a Feme Covert; the Husband alone exhibited a Bill for it; to which there was a Demurrer, becauſe the Wife was not made a Party; and the Demurrer was allowed; for of Things meerly in Action belonging to the Wife, as a Bond, *&c.* ſhe ought to join in Suit; *ſecus* of a Rent running in the Wife's Right after Marriage; for if the Husband alone ſhould ſue, and be diſmiſſed, that will not conclude the Caſe; and if he die before Judgment or Decree, the Wife cannot revive the Suit. *Trin.* 14 *Car.* 2. between *Clerk* and Lord *Angier*, 1 *Chanc. Ca.* 41.

2. A Feme Covert, who has a ſeparate Maintenance, may ſue without her Husband; reſolved upon Demurrer. 1 *Chanc. Ca.* 35.

3. A Wife, whoſe Husband is baniſhed by Act of Parliament, may act in every Thing as a Feme Solo. 2 *Vern.* 104.

4. A Bill was exhibited againſt the Husband and Wife concerning the Wife's Inheritance; the Husband ſtood out all the Proceſſes of Contempt; and it being moved, that the Bill might be taken *pro confeſſo*, it was oppoſed, becauſe that the Wife had in the *Interim* obtained an Order to anſwer; in which ſhe ſet forth a Title to herſelf; and the Court decreed, that the Bill ſhould be taken *pro confeſſo* againſt the Husband only, and that he ſhould account for all the Profits of the Land received ſince the Coverture, and the Profits which ſhall be received during the Coverture. *Hill.* 1 *Jac.* 2. between *Ward* and *Meath*, 2 *Chan. Ca.* 173.

5. A Bill was brought by the Plaintiff againſt the Husband and Wife, Daughter of the Plaintiff; the Husband put in a Plea in the Name of him and his Wife, and ſwears to the Plea; but the Wife would not be ſworn; and the Husband moved that the Plea might be accepted, ſuggeſting that the Wife did it by Combination with her Mother; and it was ordered that the Plea do ſtand for the Huſband, and the Plaintiff to proceed againſt the Wife. 1 *Chan. Ca.* 296.

6. If Husband and Wife exhibit a Bill for a Demand in Right of the Wife, the Defendants anſwer, Witneſſes are examined, and Publication paſſes, and the Husband dies, and the Wife marries a ſecond Husband; if they bring a new Bill, they may examine again the ſame Witneſſes as were examined in the former Cauſe. 2 *Vern.* 197. but *vide* 2 *Vern.* 249. *cont'*, tho' held that it might be otherwiſe, if the Demand had been of the Wife's Inheritance.

7. If a Bill be brought againſt Baron and Feme for a Demand out of the ſeparate Eſtate of the Feme, and the Husband is beyond Sea, and not amenable by the Proceſs of the Court; yet if the Wife is ſerved with a *Subpœna*, ſhe muſt appear and anſwer the Plaintiff's Bill. Between *Dubois* and *Hole*, 2 *Vern.* 613.

8. Upon the Marriage-Treaty, the Husband agreed that the Wife ſhould have her own Fortune to her own Uſe, to diſpoſe of it as ſhe thought proper; he afterwards running in Debt was arreſted by his Creditors; and the Wife, in Conſideration of their Diſcharging the Action, gave her Note for the Payment of the Money; the Creditors exhibited a Bill againſt the Husband and Wife, and took out *Subpœna's* againſt both, and actually ſerved the Wife, but not the Husband, he being at *Rotterdam*; but neither the Husband nor Wife appearing, an Attachment was taken out againſt both; and the Husband ſtill keeping out of the Way, the Wife was taken up, and being moved to be diſcharged, my Lord *Keeper* and the Maſter of the *Rolls* held that in this Caſe the Proceſs was regular enough; and that the Husband was joined in the Suit only for Conformity. *Mich.* 1711. between *Bell* and *Commiſſary Hyde*.

9. If the Wife's Anſwer differs from the Husband's, it ſhall not prejudice the Husband; as if ſhe confeſſes a Truſt, which he denies. 1 *Chan. Ca.* for ſhe can be no Witneſs againſt her Husband. 2 *Vern.* 79.

## (I) Concerning the Wife's Pin-Money and Paraphernalia.

1. IF by a Marriage-Settlement a Term is created for raiſing 20 *l. per Ann.* as Pin-Money, for the Wife's ſeparate Uſe, which is conſtantly paid her by the Husband's Steward, except the laſt Year before the Husband's Death; there being but one Year in Arrear only, it ſhall be paid; but it would be otherwiſe if it had been in Arrear ſeveral Years. *Trin.* 1691. between *Offley* and *Offley*.

2. The Plaintiff's Relation (to whom he was Heir) allowed his Wife Pin-Money, which being in Arrear, he gave her a Note to this Purpoſe; I am indebted to my Wife 100 *l.* which became due to her ſuch a Day; after, by his Will, he makes Proviſion out of his Lands for Payment of all his Debts, and all Monies which he owed to any Perſon, in Truſt for his Wife; and the Queſtion was, Whether the 100 *l.* was to be paid within this Truſt; and my Lord Keeper decreed not, becauſe in Point of Law it was no Debt, becauſe a Man cannot be indebted to his Wife; and it was not Money due to any in Truſt for her. *Hill.* 1701. between *Cornwall* and Earl of *Mountague*; but *Q.* for the Teſtator look'd on this as a Debt, and ſeems to intend to provide for it by his Will.

3. If a Woman has Pin-Money, or a ſeparate Maintenance ſettled on her, and ſhe by Management or good Houſe-wifry, ſaves Money out of it, ſhe may diſpoſe of ſuch Money ſo ſaved by her, or of any Jewels bought with it, by Writing in Nature of a Will, if ſhe die before her Husband, and ſhall have it her ſelf, if ſhe ſurvive him, and ſuch Jewels, *&c.* ſhall not be liable to the Husband's Debts. *Paſch.* 1692. between *Herbert* and *Herbert*; and the Precedent of Sir *Paul Neal*'s Caſe cited to the ſame Purpoſe; the Wife allowed what ſhe had ſaved out of her Pin-Money againſt the Deviſee of the Real Eſtate. *Mich.* 1694. between *Milles* and *Wikes*.

4. If a Woman, on her Marriage, reſerves to herſelf a Power of Diſpoſing of her Perſonal Eſtate as ſhe thinks proper, all that ſhe dies poſſeſſed of is to be taken to be her ſeparate Eſtate, or the Produce of it, unleſs the contrary can be made appear; and as ſhe has a Power over the Principal, ſo ſhe may diſpoſe of the Produce or Intereſt. *Hill.* 1705. between *Gore* and *Knight*, 2 *Vern.* 535. 1 *Vern.* 245. *S. P.* where it is ſaid, that there had been ſeveral Decrees ratifying ſuch Diſpoſition.

5. If a Woman, by her Marriage-Articles, agrees to have no Part of the Husband's Perſonal Eſtate but what he ſhould give her by Will, this bars her of her Paraphernalia. *Per Cur'*, 2 *Vern.* 83.

6. The Husband deviſed the Wife's Jewels to her for Life, the Remainder over to his Son; one Point of the Caſe was, whether they ſhould go to the Adminiſtrator of the Wife, being her Paraphernalia; and tho' it was agreed that where a Husband dies Inteſtate, or does not by Will diſpoſe of the Jewels of his Wife, ſhe may claim them, (in Caſe there be no Debts; yet as he may (*a*) deviſe them, and as he has in this Caſe given them to her for Life only, and ſhe has not made any Election or Claim to them as her Paraphernalia, they cannot go to her Adminiſtrator. 2 *Vern.* 246, 247.

(*a*) That the Husband may deviſe them, *vide* *Cro. Car.* 343.

## (K) Concerning Alimony and ſeparate Maintenance.

1. IF a Husband turns away his Wife, or uſes her with Cruelty, by which Means ſhe is obliged to leave him, Chancery will, upon her own, or *Prochein Amy*'s Application, decree her a ſeparate Maintenance, ſuitable to her Degree and Quality, the Fortune ſhe brought, and her Husband's Circumſtances. *Cary* 124. 1 *Chan. Rep.* 4. *S. P.* 1 *Chan. Rep.* 164. *S. P.*

2. If Husband and Wife agree to live ſeparate, and that the Wife ſhall have ſo much a Year, ſuch Agreement will be decreed in Equity. *Nel. Chan. Rep.* 73.

3. If there is a Decree for a ſeparate Maintenance, and the Huſband offers to be reconciled, and the Wife refuſes, tho' the Court will ſuſpend the Payment of the Money, yet will order all the Arrears to be brought into Court; and, according as there is Neceſſity, vacate the Decree, or give the Wife, upon any ill Uſage, Liberty to reſort to, and have the Benefit of it. 26 *Car.* 2. between *Whorewood* and *Whorewood*, 1 *Chan. Ca.* 250.

4. A Feme Covert who had by her Husband's Conſent 50 *l. per Ann.* ſettled on her, and who had, upon a Sentence in the Spiritual Court, obtained a Decree for 50 *l. per Ann.* more for Alimony, ſuggeſts by her Bill, that her Husband had, on Purpoſe to defraud her, procured the Tenants to ſurrender their Eſtates on which the ſaid Rents were reſerved, and prayed that it might be made good to her by the Decree of this Court; but it appearing that ſhe was a very lewd Woman, and had eloped, and her Husband offering in his Anſwer to take her again, my Lord Chancellor would make no other Order in it, but that the Husband ſhould ſtand in the Place of the Tenants, and admit the Rent payable; and ſhe to recover it at Law as well as ſhe could. *Paſch.* 1682. between *Mildmay* and *Mildmay*, 1 *Vern.* 53.

5. The Husband and Wife agree to part, and the Wife's Father agrees, upon the Husband's giving him a Note to pay back the Wife's Portion, to ſave him harmleſs from any Debts his Wife may contract, and againſt all Demands for her Maintenance; the Wife, with her Child, went thereupon and lived with the Plaintiff, her Father, and were maintained by him; and he now brought his Bill to have the Portion paid; which was decreed, on his giving Security to indemnify the Defendant againſt the Debts and Maintenance of the Wife and Child, although the Husband now offered to take his Wife home, and maintain her and her Child, and to allow the Plaintiff for the Time paſt. *Mich.* 1700. between *Seeling* and *Crawley*, 2 *Vern.* 386.

6. If by Marriage-Articles 6000 *l.* Part of the Wife's Portion, is agreed to be inveſted in Land, and ſettled in Truſt for the Husband for Life, then to his Wife for Life, Remainder as a Proviſion for younger Children, Remainder to the Husband in Fee; and the Huſband by his Cruelty forces his Wife to live ſeparate from him; the Court will decree the Intereſt of the 6000 *l.* to be paid the Wife for her ſeparate Maintenance, till Cohabitation, there being no Iſſue, the Money lying dead; and it being a Truſt which is properly to be di-

rected

rected by this Court. *Paſch.* 1705. between *Oxenden* and *Oxenden*, 2 *Vern.* 493.

7. A Wife having been uſed with Cruelty by her Husband, becomes intitled to 3000 *l.* as her Share of her Mother's Perſonal Eſtate, who died Inteſtate; and it was decreed that the Wife ſhould have the Intereſt of it for her ſeparate Uſe, and then to the Huſband, if he ſurvived; and afterwards the Principal to be paid the Iſſue; and if no Iſſue, then to the Survivor of the Husband or Wife. *Paſch.* 1711. between *Nicholls* and *Danvers*, 2 *Vern.* 671. The Reporter adds a *Memorandum*, that the Husband had given a Note to his Wife, that if he ſhould again uſe her ill, ſhe ſhould have her Share of her Mother's Eſtate to her own Uſe. *Vide* 2 *Vern.* 752. a ſeparate Maintenance decreed a Wife.

8. A Bill was brought to ſubject the Defendant's Jointure to the Payment of her Debts, which ſhe contracted whilſt ſhe had a ſeparate Maintenance from her Husband. *Per* Lord *Chancellor*, had the ſeparate Maintenance continued, there would have been ſome Reaſon to follow that, and make it liable; but that being at an End, there is no Reaſon that the Jointure ſhould be liable; and the Bill was diſmiſſed; and the rather, becauſe the Executor of the Husband, who might have paid the Money, was not made a Party. *Paſch.* 1685. between *Kenge* and *Delaval*, 1 *Vern.* 326.

9. A Woman who has a ſeparate Maintenance, may diſpoſe of what ſhe ſaves out of it by Will. *Toth.* 97. 1 *Chan. Ca.* 118. *S. P. Nel. Chan. Rep.* 56. *S. P.* 1 *Vern.* 245. *S. P.*

## (L) What Right ſurvives to either of them, or their Repreſentatives, by the Diſſolution of the Marriage.

1. IF Baron and Feme have a Decree for Money, in the Right of the Feme, and then the Baron dies, the Benefit of the Decree belongs to the Feme, and not to the Executor of the Husband: Certified by *Hyde* C. J. and his Certificate confirm'd by my Lord *Chancellor*, *Mich.* 15 *Car.* 2. between *Nanney* and *Martin*, 1 *Chan. Ca.* 27.

2. If Money is left in a Truſtee's Hands, for the Benefit of a Feme Covert, and the Husband dies, it ſhall go to the Feme, and not to the Executors of the Husband, he having made no Diſpoſition of it in his Life-time. Decreed *Paſch.* 1683. between *Twiſden* and *Wiſe*, 1 *Vern.* 161.

3. The Husband, in Conſideration of 500 *l.* Portion, Part in Lands and Part in Bonds, owing to the Wife, ſettles a Jointure of 45 *l. per Ann.* and the Husband dying before any Fine levied of the Lands, or Alteration of the Bonds, the Creditors of the Husband ſue the Widow and the Executor of the Husband; and it was held, tho' there was not ſufficient Perſonal Eſtate beſides, that as theſe Securities remained unaltered, and as the Law had caſt them on the Widow, Equity could not take them from her; tho' it was urged, that the Wife had a Jointure ſettled on her adequate to the Portion. *Trin.* 1688. between *Liſter* and *Liſter*, 2 *Vern.* 68.

4. But if upon an Intermarriage between *A.* and *B.* who has an Eſtate in Land, and a Fortune in Money, and who are both Infants,

An Act of Parliament is obtained for ſettling a Jointure on *B.* the Wife, in Bar of Dower; provided that the Jointure ſhall ceaſe, if the Wife, when of Age, does not ſettle her Land, *&c.* but nothing is ſaid as to the perſonal Eſtate, and Part of the Fortune is a Mortgage of 1300 *l.* taken in a Truſtee's Name, tho' the Wife, when ſhe came of Age ſettled her own Land only; yet the Husband dying, the Mortgage ſhall go to the Executors of the Husband, and ſhall not ſurvive to the Wife as a Choſe in Action. Decreed 1705. between *Blois* and Counteſs of *Hereford*, 2 *Vern.* 501. And my Lord Keeper laid it down as a Rule, that in all Caſes, where a Man makes a Settlement equivalent to the Wife's Portion, it ſhall be intended that he was to have the Portion, tho' there is no Agreement for that Purpoſe. Note; *This was a Choſe in Action in Equity, and ſome Streſs laid on that, tho' it does not appear by this Report.*

5. If a Man marries a Woman intitled to a Mortgage in Fee, and after Marriage aſſigns his Intereſt in the Mortgage to Truſtees to call in the Money, and lay it out in Land to be ſettled on the Husband and Wife and their Iſſue, Remainder to the Heirs of the Husband; and the Husband and Wife die without Iſſue, this Mortgage being a *Choſe in Action* ſhall go to the Executor of the Wife, and not to the Executor of the Husband. Decreed *Mich.* 1700. between *Burnet* and *Kinnaſton*, 2 *Vern.* 401.

6. *A.* being indebted to a Feme Covert becomes a Bankrupt, the Husband pays a Contribution, and dies before any Diſtribution, and then the Wife died; and it was held, that the Executors of the Wife were intitled to the Dividend; for the Husband paying Contribution, does not alter the Property of the Bond. 2 *Vern.* 707.

7. But if a Sum of Money is awarded the Husband, which he is intitled to in Right of his Wife, and the Husband dies before it is paid, it will go to his Executors, and not ſurvive to the Wife, the Award being a Sort of Judgment which has changed the Property. *Paſch.* 1686. between *Oglander* and *Baſton*, 1 *Vern.* 396.

8. If a Man marries an Orphan of *London*, who dies before 21, yet her Share ſhall ſurvive to the Husband, and ſhall not go to the other Children. 1 *Vern.* 88.

9. If an Inheritrix carves out a Term for 1000 Years to Truſtees, and ſhe and her intended Husband declare the Truſt to be for the Husband for Life, and after his Death for the Wife and her Heirs; and afterwards the Husband and Wife by Fine *Sur conceſſ.* grant a Term of twenty-one Years, reſerving the Rent to the Husband and Wife, and the Heirs of the Wife; yet the Adminiſtrator of the Wife ſhall not have the Benefit of the Rent reſerved. 2 *Vern.* 62.

10. If one dies Inteſtate, leaving a Daughter, the Wife of *J. S.* and the Daughter dies before any Diſtribution made, and the Husband dies Inteſtate, the Share of the Daughter ſhall go to the Adminiſtrator of the Husband, and not to her Adminiſtrator; but the Reporter refers to the Decree. *Mich.* 1693. between *Cary* and *Taylor*, 2 *Vern.* 302.

11. Baron and Feme Jointenants for their Lives, Baron ſows the Lands, and dies before Severance; and the Queſtion was, whether the Wife, or Executor of the Husband, ſhould have the Corn; and the Court propoſed, that each ſhould take a Moiety, which was agreed to. *Rowner's* Caſe, 2 *Vern.* 322.

12. *A.* purchaſes a Walk in *a Chaſe*, and takes the Patent to himſelf, and to his Wife, and *J. S.* during their Lives, and the Life of the Survivor; the Husband dies indebted, yet the Wife was decreed the Benefit of the Patent during her Life, for ſhe cannot be a Truſtee for her Husband; but after her Death *J. S.* is to be a Truſtee for the Husband's Executor. *Trin.* 1688. between *Kingdome* and *Bridges*, 2 *Vern.* 67.

13. If the Husband lends out Money in the Names of himſelf and his Wife upon Mortgages and Bonds, and dies, the Wife is intitled to the Money by Survivorſhip, if there are ſufficient Aſſets beſides to pay the Husband's Debts. *Trin.* 1712. between *Chriſt's Hoſpital* and *Budgin*, 2 *Vern.* 683.

14. The Plaintiff's Grandfather was Tenant for Life of a Farm, and the Inheritance was in the Plaintiff's Father to whom he is Heir; on the Marriage of the Plaintiff's Father with the Defendant, who had a Portion of 300*l.* in her Brother's Hands, and ſecured by his Bond to her, the Father and Grandfather join in ſettling this Farm upon the Defendant, for her Jointure; and this Settlement is expreſſed to be made in Conſideration of 100*l.* paid to the Grandfather, for the Marriage Portion of the Defendant, which 100*l.* was paid to him accordingly by her Brother; the Marriage took Effect, and the Defendant's Husband died indebted in ſeveral Bonds wherein he and his Heirs were bound; and Actions were brought againſt the Plaintiff as his Heir on the ſaid Bonds, to ſubject the real Eſtate deſcended to the Payment of them; and he brought his Bill to have the remaining 200*l.* of the Portion applied in Diſcharge of theſe Debts; which was decreed by the Maſter of the Rolls; but upon an Appeal to my Lord Chancellor, the Decree was reverſed, and held, that it ſurvived to the Wife; tho' he ſaid, that if the Settlement had been in Conſideration of the whole Portion, and had been equivalent to it, it muſt have gone to diſcharge the Husband's Debts. *Mich.* 1697. between *Cleland* and *Cleland*.

15. *Richard Middleton*, upon a Marriage-Treaty with *Barbara Wynn*, agrees, in Conſideration of 1250*l.* Portion ſecured to her by Bond from her Brother, to clear his Eſtate, being 70*l. per Annum*, of Incumbrances that were then upon it, within ſix Months after the Marriage ſhould be had; and for every 100*l.* he ſhould receive, to ſettle 10*l. per Ann.* on her for a Jointure, and to ſettle Lands on the firſt and other Sons of that Marriage; *Barbara* was no Party to theſe Articles; the Marriage takes Effect; *Barbara* dies within the ſix Months without Iſſue; *Richard* on a ſecond Marriage with one *Dorothy* ———, who had a Portion of 1600*l.* in Truſtees Hands, by Articles agrees to lay out 1250*l.* he was intitled unto in Right of his firſt Wife; and this 1600*l.* when received, in the Purchaſe of Lands, to be ſettled on *Dorothy* for a Jointure, and for a Proviſion for the Iſſue of that Marriage; which Marriage after takes Effect, and then *Richard* dies before he had got in either of the Portions; and my Lord *Keeper* decreed it to the Repreſentatives of *Richard*; and that it ſhould not ſurvive to the Adminiſtrator of the firſt Wife, he being a Purchaſer by his Agreement to diſincumber his Eſtate; and being in no Default, the Wife dying within the ſix Months, which prevented the Making the Settlement. *Paſch.* 1711. between *Medith* and *Wynn*.

# CAP. XII.

## Bill,

(A) By whom it may be brought.
(B) Who are to be Parties to it.
(C) Matters proper by a Bill in Equity.
(D) Bills of Diſcovery; and herein of what Things there ſhall be a Diſcovery.
(E) Bills quia Timet, in what Caſes proper.
(F) Bills of Peace to prevent Multiplicity of Suits.
(G) Croſs Bills.
(H) Supplemental Bill.
(I) Bills of Interpleader.
(K) Certiorari Bills.
(L) Bills of Review and Reverſal.
(M) Bills original after a Decree.
(N) Bill taken pro confeſſo.

### (A) By whom it may be brought.

1. THE King may ſue in Chancery for Equity. 1 *Rol. Abr.* 373.

2. The Chancellor himſelf may ſue or be ſued in Equity, but he cannot make a Decree in his own Cauſe. 1 *Rol. Abr.* 373.

3. If an Alien purchaſes Lands in the Name of another, admitting the King is intitled to the Truſt, yet he muſt ſue in Equity to have it executed. 1 *Rol. Abr.* 194.

4. The Church-wardens may join with a poor Perſon who is chargeable to the Pariſh. *March* 90.

5. A Bill may be brought in Behalf of an Infant *in Ventre ſa mere*, and an Injunction obtained to ſtay Waſte. 2 *Vern.* 711.

6. Any

6. Any one may bring a Bill as *Prochein amy* to an Infant, without his Conſent, becauſe it is at his Peril that he brings it, to be anſwerable for the Event; but none can bring a Bill in the Name of a Feme Covert, as her *Prochein amy*, without her Conſent; and if ſuch Bill be brought, upon her Affidavit of the Matter it will be diſmiſſed; agreed by the Court. *Mich.* 1713. between *Andrews* and *Cradock*.

## (B) Who are to be Parties to it.

1. IF a Man grants a Rent-Charge, and afterwards ſells the Lands by Parcels, and the Grantee ſues for the Rent, he muſt make all the Purchaſers (*a*) Parties. *Cary* 3, 33. *S. P.*

(*a*) If Two or more have a joint Intereſt, regularly they muſt be all Parties to the Bill; ſo if Two, or more, are liable to a Demand, you cannot proceed againſt one alone. 2 *Vern.* 195. So all Executors, Truſtees, or their Repreſentatives, are to be made Parties; but this Rule may be diſpenſed with, if any of them are not amenable, or if they have ſtood out Proceſs to a Sequeſtration.

2. But in Caſe of a Charity, it is not neceſſary that all the Tertenants ſhould be made Parties, for the Charity ſhall not be put to that Difficulty; but the Tertenants may, if they ſeek a Contribution, undertake to make them Parties to the Information, or help themſelves by ſuch Courſe as they ſhall think fit. 1 *Salk.* 163.

3. If there be an Agreement in a Pariſh, by a Veſtry Order, that 100*l. per Ann.* ſhould be paid to *A.* for a Lecture in the Pariſh, in a Bill for the Recovery thereof, all the Parties to the Order muſt be made Defendants; otherwiſe it cannot he decreed. *Mich.* 15 *Car.* 2. between *Henchman* and *Ayer*, *Hard.* 333.

4. The Bill being to have an Account of a Truſt, the Defendant pleaded, that he was intruſted for three Children, *viz.* for the Plaintiff and his two Brothers; and that the other Two not being made Parties to the Suit, he was not bound to anſwer, for otherwiſe he might be thrice called to an Account for the ſame Matter; and the Plea was allowed. *Mich.* 1682. between *Hanne* and *Stevens*, 1 *Vern.* 110.

5. But if *A.* deviſes ſeveral Legacies to *B. C.* and *D.* and that if his Eſtate fell ſhort, each to abate in Proportion; but if it increaſed, that each Legacy ſhould increaſe in Proportion; in this Caſe one alone may ſue for his Legacy; and it is not neceſſary that the other Legatees ſhould be made Parties. *Mich.* 34 *Car.* 2. between *Haycock* and *Haycock*, 2 *Chan. Ca.* 124. Tho' one Legatee may ſue, yet if the Reſidue of the Perſonal Eſtate be deviſed to Three; *Q.* Whether one of them may alone ſue for his Part; and *vide Nel. Chan. Rep.* 243. where it is held that he cannot.

6. If a Bill be exhibited againſt the Sheriff and Plaintiff at Law, to be relieved againſt a Bail-Bond aſſigned by Fraud by the Sheriff; let the Proof of the Fraud be never ſo ſtrong, yet if the Plaintiff at Law is not ſerved with an Order to anſwer, ſo as to be made a Party, the Plaintiff can have no Relief: Ordered by the Maſter of the *Rolls*. *Mich.* 1682. between *Izraell* and *Narbourne*, 1 *Vern.* 87.

7. A Bill being exhibited for Diſcovery of a Bankrupt's Eſtate; the Defendant demurred thereto, becauſe the Bankrupt was not made a Party; and the Demurrer was allowed. *Hill.* 1688. between *Sharp* and *Gamon*, 2 *Vern.* 32.

8. Upon a Bill for a ſpecifick Performance of a Covenant under Hand and Seal with *A.* for the Benefit of *B.* *A.* muſt be made a Party to the Suit; but if it had been only a Promiſe, either *A.* or *B.* might have brought the Action, according to the Caſe in * *Yelverton's Reports*, *Hill.* 1638. between *Cook* and *Cook*, 2 *Vern.* 36.

* *Rolls* v. *Yates* 177.

9. If a Perſon claims any Thing due from the Teſtator, the Executor muſt be made a Party. *Nel. Chan. Rep.* 334. All Executors muſt ſue and be ſued. 3 *Chan. Rep.* 92.

10. If a Legatee of a Term ſues for it, he muſt make the Executor a Party, although he alledges he has his Aſſent. Between *Moor* and *Blagrave*, 1 *Chan. Ca.* 277.

11. So if an Executor does actually releaſe, yet he muſt be made a Party to the Suit. *Hill.* 1681. between *Smithby* and *Hinton*, 1 *Vern.* 31.

12. But if the Plaintiff ſues one Executor, and alledges in his Bill that he does not know who the other Executor is, and prays a Diſcovery, this will be no Cauſe of Demurrer, ruled. *Mich.* 1682. between *Bowyer* and *Covert*, 1 *Vern.* 95.

13. In a Bill to be relieved touching a Leaſe for Years, or other perſonal Duty againſt Executors, though the Executors be but Executors in Truſt; yet it is not neceſſary to make the *Ceſtui que Truſts*, or Reſiduary Legatees, Parties. 1 *Vern.* 261.

14. In a Bill to be relieved againſt an Award, made by ſome of the Members of the *E. I.* Company, touching the Quantum of Freight due to the Plaintiff from the Company; the Arbitrators, and ſome of the particular Members being made Defendants, they demurred to the whole Bill, becauſe the Plaintiff could have no Decree againſt them; and their Anſwers would be no Evidence againſt the Company; and the Plaintiff might examine them as Witneſſes. And the Demurrer was allowed without putting them to Anſwer as to Matters of Fraud and Contrivance. *Trin.* 1700. between Dr. *Steward* and the *Eaſt India Company*, 2 *Vern.* 380.

15. If any one ſue in Chancery an Executor of an Obligor to diſcover Aſſets, all the Obligors muſt be made Parties, that the Charge may lie equal. 2 *Vent.* 348. The Reporter adds a *Quære*, Whether the Principal may not be ſued without thoſe who are bound as Sureties. *Vide Nel. Chan. Rep.* 105. where it is held not to be neceſſary to ſue all the Obligors; and that any one who is compelled to pay the Money, may compel the others to contribute.

16. But 'tis clear, that if a Judgment be had at Law againſt one Obligor, you may ſue the Executor of him alone to diſcover Aſſets, *&c.* becauſe the Bond is drowned in the Judgment. 2 *Vent.* 348. 2 *Chan. Ca.* 29. *S. P.*

17. If one of the Defendants is proſecuted to a Sequeſtration, the Cauſe may be carried on without him. *Mich.* 1699. between *Parker* and *Blackburne*.

18. The Plaintiff being Reſiduary Legatee brought his Bill againſt the Defendant, who was one of the Executors (without his Co-executor, who was beyond Sea) to have an Account of his own Receipts and Payments: The Defendant inſiſted that his Co-executor ought to be made a Party; but my Lord Chancellor ordered the Cauſe to go on, and ſaid, that if any Thing appeared difficult on the Account, the Court would take Care of it. And as a Bill may be brought againſt one Factor without his Co-factor, being beyond

Sea, that the ſame Reaſon held here. *Mich.* 1698. between *Cowſlad* and *Cely*.

19. *Barnard Spark*, in 1661. made his Will, and amongſt other Legacies deviſed an Annuity of 20 *l. per Annum* to *B.* to be paid Quarterly, and gives other Legacies; and then has this Clauſe, *all the Reſt of my real and perſonal Eſtate not before bequeathed, (my Debts being paid,) I give to my Brother* John Spark, and makes him ſole Executor; and he paid the Annuity ſeveral Years, and made his Will, and charged all his real and perſonal Eſtate with this Annuity, and deviſed all his real and perſonal Eſtate in *England* (Part of which was the Eſtate of *Barnard*) to his two Daughters, who were Defendants; and all his real and perſonal Eſtate in *Barbadoes*, to his two other Daughters that lived in *Barbadoes*, and were no Parties to this Suit: The two Daughters here paid the Annuity ſeveral Years, but then ſtop'd Payment, on Pretence, that the Words of *Barnard*'s Will did not charge his real Eſtate with this Annuity; or if they did, yet the perſonal Eſtate ought to be firſt exhauſted, which did not appear to be: And the real and perſonal Eſtate in *Barbadoes* being equally liable by the Will of *John*, the Daughters, who have thoſe, ought to be made Parties, for they might have made Satisfaction; or however, they ought to have been before the Court, that the Defendants might, at the ſame Time, have a Decree againſt them to pay their Proportion; for though at Law the Party may take his Remedy againſt which he pleaſes; yet in Equity, all muſt be Parties, that Right may be done to all at the ſame Time. On the other Side it was ſaid, admit it to be ſo, in Caſe it may be eaſily done, yet 'tis impracticable in this Caſe, and therefore ought not to be required; and ſo held my Lord Keeper, and that the Lands were charged by *Barnard*'s Will; and if any Satisfaction has been made by thoſe in *Barbadoes*, it lay on the Defendant's Part to ſhew it. *Paſch.* 1702. between *Quintine* and *Yard*.

20. Sir *Edmund Forteſcue*, in the Year 1664. ſettled his Eſtate upon *Powel*, *Glendale* and *Harris*, in Truſt to pay his Debts in the firſt place, then to pay ſuch Portions as he ſhould give to his Children; and laſtly, his Legacies, and the Overplus, to be laid out in a Purchaſe in Truſt for the firſt Son, and the Heirs of his Body, and ſo for the ſecond, *&c.* and for Want of ſuch Iſſue in Truſt for himſelf and his Heirs; the Plaintiff, his Grandaughter and Heir at Law, on whom the Truſt devolved, brought her Bill againſt the Adminiſtrator and Heir at Law of *Harris*, (*Powel*, *Glendale* and *Harris* being dead) to diſcover ſome Lands purchaſed with the Overplus Money by *Harris*, who had formerly been a Servant in Sir *Edmund*'s Family, and who alone had tranſacted the Truſt. To which it was objected, that the Repreſentatives of the other Truſtees ought to have been before the Court; but the Plaintiff inſiſting only to have an Account of what came to the proper Hands of *Harris*, and of his Receipts and Diſburſements only, and not of any Joint Receipts or Tranſactions by him, with the other Truſtees; the Objection was over-ruled. *Hill.* 9 *Ann.* between Lady *Selyard* and the Executors of *Harris & al'*.

(C) Matters

## (C) Matters proper by a Bill in Equity.

*Vide* Title *Courts and their Juriſdiction*, Letter (B).

1. A Bill in Equity lies to ſet aſide Letters Patent obtained by Fraud. *Attorney General* verſus *Vernon*, 1 *Vern.* 277.

2. A Solicitor may have a Bill for Fees only, if for Buſineſs done in this Court; and ſo he may when the Buſineſs is done in another Court, if it relates to another Demand the Plaintiff makes in this Court. 1 *Vern.* 203.

3. A Bill in Equity will lie for recovering antient Quit-Rents, tho' very ſmall, as two or three *Shillings per Annum*. Between *Cox* and *Foley*, 1 *Vern.* 359.

4. (*a*) A Suit for ſmall Tithes, not proper for Chancery; neither has it been uſed; *per* Sir *John Churchil*, as *Amicus Curiæ*. 2 *Chan. Ca.* 237.

(*a*) The Court of Chancery will not retain a Suit by *Engliſh* Bill under 10 *l.* Value, except in Caſes of Charity, nor under the Value of 40 *s. per Annum* in Lands.

5. The Plaintiff being Executor, and his Teſtator greatly indebted, and being deſirous to be rid of the Aſſets as far as they would go, and that his Payments might not be afterwards queſtioned, brought a Bill againſt all the Creditors, to the Intent they might, if they would, conteſt each other's Debts, and diſpute who ought to be preferred in Payment; the Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter wherein he was not concerned. But the Court over-ruled the Demurrer, and held it a proper Bill, and a ſafe Way for an Executor to take. *Hill.* 1688. between *Buckle* and *Atleo*, 2 *Vern.* 37.

6. If *A.* obtains a Decree before the Ordinary for an *Iſle* in a Church, and he brings Bill for the Decree of this Court to quiet him in Poſſeſſion, the Bill will be diſmiſs'd with Coſts; for this Court executes not its own Decrees by Bill, without examining the Juſtice of them. *Paſch.* 1691. between *Baker* and *Child*, 2 *Vern.* 226.

## (D) Bills of Diſcovery; and herein of what Things there ſhall be a Diſcovery.

1. IF the King grants the Goods of a Felon, the Grantee may compel any one, in whoſe Poſſeſſion they are, to diſcover them. *Cary* 1.

2. If a Perſon is outlawed, a Bill may be exhibited by the *Attorney General* to diſcover his real and perſonal Eſtate; for the Outlawry is in Nature of a Gift to, or Judgment for, the King. *Mich.* 1655. between the *Protector* and Lord *Lamley*, *Hard.* 22.

3. A Bill was exhibited by the *Attorney General* in the Exchequer, wherein it was charged, that the Defendant, being a Merchant had concealed the Cuſtom of 290 Casks of Currans; and for the better Effecting thereof, had given 40 *l.* a-piece to two Cuſtom-Houſe Officers; and Relief and Diſcovery prayed; but upon a Demurrer it was doubted whether the Defendant ſhould be bound to diſcover. *Hard.* 137. *Hard.* 201. *S. P.* adjourned, where it was alledged, the *Attorney General* would not proſecute for the Forfeiture, but for the Duty only.

4. If the Plaintiff alledges that the Defendant had cauſed the Plaintiff's *Port* Wines to be ſeiſed as *French* Wines, on Purpoſe to raiſe the Price of the Market, and to ſell his own Wines at a better Rate, and detained the Plaintiff till he had ſold his own Wines, and then relinquiſhed his Proſecution, well knowing that the Plaintiff's Wines were *Port* Wines: And he prays an Anſwer and Diſcovery to thoſe Matters, in Order to his bringing an Action. The Defendant may plead the Act for prohibiting of *French* Wines, and a Penal Clauſe therein on any Man that ſhould ſeiſe Wines, and afterwards relinquiſh his Proſecution; and it will be allowed. *Mich.* 1682. between *Bird* and *Hardwick*, 1 *Vern.* 109.

5. If it is charged by the Bill, that the Defendant, in 1659, by Colour of an Order of Sequeſtration by the Committee, had ſeized ſeveral Tithes, *&c.* due to the Plaintiff, the Plaintiff may pray a Diſcovery of the Particulars ſo taken, and their Value; as where a Man by Colour of a Title enters into a Houſe, *&c.* and poſſeſſes himſelf of the Goods, *&c.* for it may be impoſſible for the Plaintiff to diſcover the Particulars, without ſuch Bill; and this is a Charge not by Way of Treſpaſs, but under Colour of Title: So where a Will is proved, and the precedent Adminiſtration revoked, ſuch Bill is uſually neceſſary for the Diſcovery of the Goods; and yet in Strictneſs of Law there was a Treſpaſs; reſolved upon a Demurrer, between *Cage* and *Warner*, *Hard.* 1682.

6. A Bill was brought to diſcover who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring an Action for the Damages his Goods ſuſtained by the Lighter's being over-ſet by Negligence of the Lighter-man; to which the Defendant demurred; but the Demurrer was over-ruled. Between Sir *John Heathcote* and Sir *John Fleet*, 2 *Vern.* 442.

7. So where the Ship, called the *Turkey-Merchant*, taking Fire by the Neglect of the Maſter or Ship's Crew; the Plaintiff, who was one of the Freighters, and had his Goods burnt, brought his Bill to diſcover who were Part-owners of the Ship, to enable him to bring his Action; to which the Defendant demurred, and inſiſted that this was like the Caſe where a Fire happens in a Man's Houſe, and burns his Neighbour's alſo; although he is liable to Damages at Law, yet the Plaintiff, in ſuch Caſe, ſhall not be aſſiſted in Equity; but the Court held that the Caſe put was not parallel; for tho' the Law gives an Action, yet it doth not ariſe out of any Contract or Undertaking of the Party; and that this and the precedent Caſe came within the Reaſon of the Caſe of any common Carrier; and therefore over-ruled the Demurrer. *Mich.* 1703. between *Morſe* and *Buckworth*, 2 *Vern.* 443.

8. A Bill was brought to diſcover who was Tenant of the Freehold, in order to bring a *Formedon*, to which there was a Demurrer, and it was allowed. *Hill.* 1683. between *Stapleton* and *Sherrard*; 1 *Vern.* 212. though the Caſe of *Bickerton* and *Bickerton* was quoted to the contrary. *Vide Cary* 22. where it is ſaid that ſuch Bills have been frequent.

9. A Demurrer to a Bill brought to diſcover the Tenant to a *Præcipe* on a voluntary Conveyance, allowed. *Mich.* 1684. between *Sherburn* and *Clerk*, 1 *Vern.* 273. 1 *Vern.* 213. *S. P. per* Lord Keeper, who ſaid that there were Ways of knowing it without.

10. If a Bill be exhibited to diſcover whether a Woman be married or no, and Marriage would be a Forfeiture of her Eſtate, ſhe is not obliged to diſcover; ſuch a Bill diſmiſſed. 24 *Car.* 2. between *Monnins* and *Monnins*, 2 *Chan. Rep.* 86.

11. If a Bill be brought to eſtabliſh an Agreement for a ſeparate Maintenance, and the Wife ſeeks a Diſcovery of hard Uſage, the Husband may demur to that Part, and it will be allowed. *Mich.* 1682. between *Hinks* and *Nelthorp*, 1 *Vern.* 204.

12. The Plaintiff's Bill was for a Diſcovery of a Perſonal Eſtate that was deviſed to Charities relating to the College of, *&c.* the Defendant pleaded that the Will was not yet proved, but was controverted in the Spiritual Court; but the Court over-ruled the Plea, a Diſcovery of the Eſtate being for the Benefit of all Perſons intereſted therein, and neceſſary for the Preſervation thereof. *Paſch.* 1688. between *Dullwich College* and *Johnſon*, 2 *Vern.* 49. 1 *Vern.* 106. *S. P. accord.* where the Right of Adminiſtration was conteſted.

13. The Plaintiff having obtained a Judgment againſt the Defendant on a Bond of 1400*l.* Penalty for Payment of 700*l.* and Intereſt, brought his Bill, ſetting forth this Judgment, and complained that the Defendant, to defraud him of the Benefit of it, had aſſigned his Eſtate to Truſtees, that he had lent 1200*l.* to *R.* and *G.* who were ſince become Bankrupts in the Name of one *E.* but that it was in Truſt for the Defendant; and therefore prayed a Diſcovery of the Matter: And that the Plaintiff might come in under the Statute of Bankruptcy for this 1200*l.* Debt; and that the Commiſſioners might not make any Diſtribution till this Matter was determined. The Defendant demurred, for that there could not be a Diſcovery of a Man's perſonal Eſtate in his Life-time; and for that this Bill was in Nature of a Foreign Attachment, which the Practiſe of this Court did not admit or countenance; but the Demurrer was over-ruled. *Paſch.* 1686. between *Smithier* and *Lewis*, 1 *Vern.* 398, 399.

14. But where *A.* obtained Judgment againſt *B.* and brought a Bill againſt *C.* for a Diſcovery of *B.*'s Goods which *C.* had got into his Hands; and the Defendant demurred, becauſe the Plaintiff had not alledged he had taken out Execution againſt *B.* and the Demurrer was allowed. *Paſch.* 1686. between *Angell* and *Draper*, 1 *Vern.* 399.

15. The Bill was to diſcover whether the Defendant had not aſſigned over a Leaſe; the Defendant pleads that there was a Proviſo in the Leaſe, that in Caſe he aſſigned over, the Leaſe ſhould be void; and that this being in the Nature of a Penalty or Forfeiture, he ought not to be compelled in a Court of Equity to diſcover. For the Plaintiff it was ſaid, that this was not a Penalty, but Part of the Contract; yet the Plea was allowed. *Hill.* 1700. between *Fane* and *Atlee.*

16. The Defendant was one of the Super-Cargoes of the *Royal George*, belonging to the Plaintiffs; and on his being ſo appointed entered into a Bond with Sureties, of 5000*l.* Penalty, not to trade to any of the Places prohibited by the *Act* of the 9th of the late *Queen* for erecting the *South-Sea Company*, or contrary to the *Aſſiento Contract* with the King of *Spain*, and ſeveral other Reſtrictions; and he on his Part covenanted not to trade to any of the ſaid Places, or contrary to the ſaid Contract; and covenanted not to plead or demur to any Bill which ſhould be brought againſt him in Equity for a Diſcovery of his Trading or Dealings contrary

to his Agreement; and this Bill was brought, charging him with ſeveral Breaches of Covenant, to the Prejudice of the Plaintiffs, to the Amount of ſeveral 1000*l.* and for a Diſcovery thereof, *&c.* and the Plaintiffs by their Bill waved the 5000*l.* Penalty of the Bond. To this Bill the Defendant pleaded the Statute 9 *Annæ*, and ſeveral Articles of the *Aſſiento Contract*, whereby whoever traded contrary thereunto, were liable to great Penalties, as Confiſcation of Ship and Goods, and ſeveral other Forfeitures. And it was ſtrongly urged, that by Law no one was bound to diſcover any Matters which tended to ſubject him to Penalties or Forfeitures; that it was the Buſineſs of Courts of Equity to relieve againſt, not to aſſiſt Forfeitures; and that this Covenant not to plead or demur, was illegal and void in it ſelf, as it tended to deprive him of the Benefit of the Law, like a Covenant not to bring a Replevin, or ſuch like. But the Plea was over-ruled; becauſe he certainly might, if he thought fit, forego or wave the Benefit of the Law in thoſe Particulars, which here he has expreſly covenanted to do; and which were the more neceſſary to be required of him, as the Plaintiffs themſelves were under like Penalties in Caſe any of their Factors or Agents traded contrary to that Act, or the *Aſſiento Contract*: And this Covenant not to plead or demur, was purpoſely to obviate the Pretence, that he ought not to diſcover any Thing whereby to ſubject himſelf to any Penalties; which ſince he has expreſly conſented to and covenanted for, he ſhall not now be at Liberty to object to the Illegality of: And it was ſaid to be ſo reſolved in a like Caſe between the *E. I. Company* and *Atkins*, in the Time of the Lord *Macclesfield*, on a very ſolemn Debate. *Mich.* 1728. *South-Sea Company* verſus *Bumſted*.

## (E) Bills quia Timet in what Caſes proper.

1. *A.* Had the Uſe of Goods and a Library for Life, Remainder to the Plaintiff's Wife, who was dead; but he, as her Adminiſtrator, brought his Bill to have the Goods, *&c.* ſecured to him after the Death of *A.* which was decreed accordingly. 12 *Car.* 1. between *Bracken* and *Bently*, 1 *Chan. Rep.* 110.

2. A Bill was brought to deliver up an Apprentice's Bond and Indentures, he being out of his Time; and it was ordered that the Maſter do either bring his Action within a Year, or deliver up the Bond and Indentures; for if it were at the Maſter's Choice to ſtay as long as he pleaſed, he would perhaps ſtay till the Apprentice's Witneſſes were dead. 17 *Car.* 2. between *Baker* and *Shelbury*, 1 *Chan. Ca.* 70.

3. The Defendant's Teſtator gave the Plaintiff 1000*l.* to be paid at the Age of twenty-one Years: The Bill ſuggeſted that the Defendant, who was Executor, waſted the Eſtate; and therefore the Plaintiff prayed that he might give Security for the Payment of the Legacy at ſuch Time as it ſhould become due, which the Maſter of the Rolls decreed accordingly. *Hill.* 2 *Car.* 2. between *Duncumbun* and *Stint*, 1 *Chan. Ca.* 121.

4. If *A.* being ſeized of Lands in Fee, grants a Rent-charge iſſuing thereout, and after deviſes the Lands to *B.* for Life, the Remainder to *C.* in Fee, and dies, *C.* may compel *B.* to pay the Arrears, for

fear all ſhould fall on *C.* in Reverſion; although it was urged that this was a remote Poſſibility. *Hill.* 25 *Car.* 2. between *Hayes* and *Hayes*, 1 *Chan. Ca.* 223.

5. If *A.* is bound for *B.* and has a Counter-bond from *B.* and the Money is become payable on the Original Bond, Equity will compel *B.* to pay the Debt, though *A.* is not ſued; for it is unreaſonable that a Man ſhould always have ſuch a Cloud hang over him; *per North* L. *Keeper*, 1 *Vern.* 190.

## (F) Bills of Peace to prevent Multiplicity of Suits.

1. UPON a Motion for a new Trial after Verdicts upon two Iſſues, which were directed, the one to try whether the Lord of a Manor had a Grant of Free Warren; and the other, in Caſe he had the Grant of Free Warren, whether there was ſufficient Common left for the Tenants; my Lord Chancellor ſaid, That thoſe Matters were properly triable at Law; but it being urged that the Bill was brought to prevent Multiplicity of Suits, and was in Nature of a Bill of Peace; a new Trial was granted upon Payment of full Coſts. *Mich.* 1681. between *How* and the Tenants of *Muſgrave*, 1 *Vern.* 22. *Cary* 3. Bills of Peace proper in Equity. 1 *Vern.* 266. where ſeveral Tenants of a Manor claimed a Right to the Profits of a Fair; and a Bill was allowed to eſtabliſh it.

2. A Bill ſhewing that one Commoner had recovered on Shilling, or other ſmall Damages, againſt the Plaintiff for oppreſſing the Common, or for uſing the Common where he ought not; and therefore, that the Defendant, another Commoner, may accept of like Damages for what is paſt, to prevent Charges at Law, is in Nature of a Bill of Peace, and proper in Equity. 1 *Vern.* 308.

3. *A.* directed *B.* to pay to *C.* what Sums *C.* ſhould want, *C.* accordingly received two Sums of Money (amongſt others) of *B.* for which he gave Receipts, as by the Order of *A.* *A.* and *C.* come to an Account, which being ſtated, they gave mutual Releaſes; but the two Sums not being entered in the Books of *A.* were not accounted for by *C.* *B.* not having received any Allowance from *A.* for the two Sums, prefers his Bill againſt *C.* to have the Money paid back. *C.* confeſſed the Receipts, but inſiſted that he ought not to pay the Money, for that they never had any Dealings together but upon the Credit of *A.* and it was to be preſumed that the Plaintiff had an Allowance from *A.* he never paying the Defendant any Thing but upon the Credit of *A.* and the Receipts ſo worded. But the Court decreed that the Defendant ſhould return the Money, for the Plaintiff has a fair Claim againſt the Defendant to avoid Circuity of Suits; for otherwiſe it would only turn the Plaintiff on *A.* and *A.* on the Defendant again in Equity, to ſet aſide the Releaſe, and to have an Allowance of theſe Sums. *Show. P. C.* 17.

(G) Croſs

## (G) Croſs Bills.

1. A Croſs Bill is a Bill brought by the Defendant againſt the Plaintiff in a prior Suit depending; it muſt be brought before Publication paſt in the other Suit, except the Plaintiff in the Croſs Bill will go to hearing upon the Depoſitions already publiſhed, becauſe of the Danger of Perjury and Subornation. *Vide Nel. Chan. Rep.* 103.

2. If there be a Bill exhibited in one Court of Equity, there may be a Croſs Bill in another; as if the Mortgagor exhibits a Bill to redeem in the Exchequer, the Defendant may bring a Bill in Chancery to fore-cloſe. *Per North* L. *Keeper.* 1 *Vern.* 221.

## (H) Supplemental Bills.

1. THE Plaintiff brought a Supplemental Bill for Diſcovery of more Evidence touching a Matter of Account; to which the Defendant pleaded the former Bill, and that the Cauſe was heard, and an Account directed; but he was ordered to anſwer to all Matters in this Bill not anſwered unto in the former Caſe, but the Plaintiff not to reply or proceed any farther without order. 30 *Car.* 2. between *Boeve* and *Skipwith*, 2 *Chan. Rep.* 142.

2. In a Bill of Review a new Supplemental Bill may be added. *Hill.* 1682. between *Price* and *Keyte*, 1 *Vern.* 135.

## (I) Bills of Interpleader.

1. IF a Cauſe has been heard upon a Bill of (*a*) Interpleader, and a Trial at Law directed to ſettle the Right between the Defendants, there is an End of the Suit, as to the Plaintiff; ſo that if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor, each Defendant being in the Nature of a Plaintiff: Ruled upon Motion. 1 *Vern.* 351.

(*a*) A Bill of Interpleader is a Bill exhibited by a third Perſon, who not knowing to whom he ought of Right to render a Debt or Duty, fears he may be hurt by ſome of the Claimants, and therefore prays that they may interplead, ſo that the Court may judge to whom the Thing belongs; and he thereby rendered ſafe on the Payment: And this he may do whether any Suits be actually commenced againſt him in Law or Equity, or is only in Danger of being moleſted by the Printed Orders; it appears that the Plaintiff in a Bill of Interpleader, muſt annex to his Bill, or upon filing thereof make an Affidavit that there is no Colluſion between him and any of the Parties.

## (K) Certiorari Bills.

1. THE Plaintiff brought a (*a*) *Certiorari* Bill to remove a Cauſe out of the Mayor's Court, his Witneſſes living out of that Jurisdiction, and inſerted other Matters relating to an Account not in Controverſy in the Mayor's Court. After Examination of Wit-

(*a*) A *Certiorari* Bill is for removing a Cauſe out of an Inferior Court of Equity, upon Suggeſtion that the Cauſe is out of its Juriſdiction, or that the Witneſſes live out of the Juriſdiction, or upon ſome good Reaſons given why equal Juſtice may not be had in ſuch Court; but whether, after a Decree in any ſuch Court, a Bill of Appeal or Review will lie to Chancery to reverſe it, *Q. & vide* 1 *Vern.* 177, 184, 443.

neſſes, the Defendant moved for a *Procedendo*, and inſiſted that if the Cauſe ſhould be heard here, he could not be relieved, not having any Bill here; but a *Procedendo* was denied, the Bill containing other Matters not determinable in the Mayor's Court; neither can the Bill be divided: But the Cauſe after hearing was diſmiſſed out of this Court. *Mich.* 15 *Car.* 2. between *Rich* and *Jaquis*, 1 *Chan. Ca.* 31.

2. The Plaintiff, an Apprentice, had ſued in the Mayor's Court to have 150 *l.* repaid, which his Mother had given to the Defendant to take him as his Apprentice; the Defendant brought his *Certiorari* Bill, and entred into Bond to prove his Suggeſtions within the Time limited, as uſual; and upon a Reference to a Maſter, he certified the Plaintiff had proved his Suggeſtions; and thereupon, although a *Procedendo* was ſeveral Times moved for, it was denied; ſo the Defendant was neceſſitated to reply, and both Sides examined their Witneſſes; and Publication being paſſed, the Plaintiff ſerved the Defendant to hear Judgment; and upon opening the Nature of the Caſe, the Lord Keeper and Maſter of the Rolls were both of Opinion, that it ſhould be ſent back to be determined in the Mayor's Court; and the *Regiſter* ſaid it had been often done both Ways, ſometimes retained and decreed here, but oftner ſent back; ſometimes after Publication, and ſometimes after a *Subpœna* ſerved to hear Judgment. *Hill.* 1704. between *Stephenſon* and *Houlditch*, 2 *Vern.* 491.

## (L) Bills of Review and Reverſal.

1. IF the Chancellor errs in a Decree in a Matter of Law, and it appears within the Decree, this Decree may be reviewed for this Error. 1 *Rol. Abr.* 332.

2. So if the Chancellor errs in his Conſcience upon a Matter of Fact proved before him, there may be a Review upon this Matter, becauſe there needs no Examination; but this may be reviewed on the old Depoſitions; and this is uſual. 1 *Rol. Abr.* 382.

3. But if the Chancellor errs in his Decree upon a Matter of Fact, this Decree is final, and cannot be revieved, becauſe they cannot go upon a new Examination of Witneſſes now; for after Publication this cannot be done. 1 *Rol. Abr.* 382.

4. No new Evidence, or Matter which might have been uſed in the firſt Cauſe, and of which the Party had then Knowledge, ſhall be ſufficient Grounds for a Bill of Review. 3 *Chanc. Rep.* 76. 1 *Chanc. Ca.* 43. *S. P.* Laid down by Counſel as a Maxim. 2 *Chan. Rep.* 45. *S. P.*

5. No Errors can be aſſigned on a Bill of Review, but Errors in Law; and ſuch muſt appear from the Facts ſtated in the Decree; if new Matter is after diſcovered, it can only be aſſigned for Error, by Leave of the Court. *Paſch.* 1683. between *Milliſh* and *Williams*, 1 *Vern.* 166. 1 *Vern.* 292. *S. P. per Cur'.*

6. If a Man brings a Bill of Review, to which there is a Demurrer, and the Demurrer allowed, he cannot afterwards bring a new Bill of Review. 1 *Vern.* 44. 1 *Vern.* 417. *S. P.*

7. So where a Bill was taken *pro confeſſo*, and a Bill of Review brought, to which the Defendant demurred, which was allowed;

and a new Bill of Review being brought, the Defendant demurred; and for Cauſe ſhewed, that a Bill of Review lies not after a Bill of Review; and the Demurrer was allowed. *Hill.* 1682. between *Dunny* and *Filmore*, 1 *Vern.* 135. 2 *Chanc. Ca.* 133. *S. C.*

8. Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, ſo as to prevent the Demurrer's being re-argued. *Hill.* 1690. between *Woots* and *Tucker*, 2 *Vern.* 120. *Per Curiam.*

9. A Decree was obtained for a large Sum of Money, and a Bill of Review was brought, and new Matter aſſigned for Error; and the Rule of Court was pleaded, *viz.* that the Defendant ought firſt to pay the Money into Court before the Bill brought: But *per Cur'*, let him give good Security, and we will diſpenſe with the Rule. 14 *Car.* 2. between *Levil* and *Darrey*, 1 *Chanc. Ca.* 42.

10. On a Motion to ſtay Proceedings on a Decree, until the Plaintiff was heard on a Bill of Review, it being inſiſted upon, that a Bill of Review was in itſelf a *Superſeadas*, and like a Writ of Error at Law; but *per* Lord *Keeper*, the Decree ſhall be performed to a Tittle before any Bill of Review be allowed, unleſs the Plaintiff will ſwear that he is not able to perform the Decree, and will ſurrender himſelf to the *Fleet*, and lie in Priſon till the Matter be determined on the Bill of Review. *Hill.* 1682. between *Williams* and *Melliſh*, 1 *Vern.* 117.

11. Upon a Motion, that a Bill of Review might be admitted, without Payment of the Coſts of the former Suit, amounting to 150 *l.* for which the now Plaintiff, as was pretended, had been in Execution almoſt twenty Years, and was not able to pay them. *Per Cur'*, Upon his making Oath that he is not worth 40 *l.* beſides the Matter in Queſtion, and beſides a Suit depending between the ſame Parties to foreclooſe a Mortgage, the Debt being pretended to be overpaid, he ſhall be admitted to bring his Bill of Review without Payment of Coſts. *Mich.* 1684. between *Fitton* and *Macclesfield*, 1 *Vern.* 264. *vide* 1 *Vern.* 292. where it is ſaid, that paying of Coſts, upon bringing a Bill of Review, is diſpenſed with by a late Order. 1 *Vern.* 292.

## (M) Bills original after a Decree.

1. A Feme Covert, after Separation from her Husband, had a Decree for Alimony, which Decree was confirmed on a Bill of Review; but the Husband being willing to be reconciled to his Wife, and to cohabit with her, exhibited an original Bill to ſet aſide the Decree; and it was held by *Finch* Lord Keeper, aſſiſted by *North* C. J. to be a proper Bill. *Hill.* 26 *Car.* between *Whorewood* and *Whorewood*, 1 *Chanc. Ca.* 250. where it is ſaid to have been reſolved, that where a Decree is temporary, or for ſpecial Ends, an original Bill lies, to ſhew that the Purpoſes of the Decree are ſatisfied, and to put a Period to it. *Vid.* 2 *Chanc. Rep.* 128.

2. An original Bill to execute a Decree of Lands againſt a Purchaſer, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto, by the Lord *Keeper*. *Trin.* 26 *Car.* 2. between *Organ* and *Gardiner*, 1 *Chanc. Ca.* 231.

3. If a Bill be brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes to the Matters in Iſſue in the former Cauſe; but on ſuch a Bill the Court may examine the Juſtice of the former Decree; but then it muſt be by Proofs taken in the Cauſe wherein that Decree is made. *Per Cur'*, 2 *Vern.* 409. *vid.* 1 *Chanc. Ca.* 45. where it is ſaid, that no original Bill ought to be brought to explain a Decree, on any Matter precedent to the Decree.

4. An original Bill, barely in Nature of a Bill of Revivor, and not broader or longer than a Bill of Revivor only does not open the firſt Decree, to have it look'd into; but if it be to inforce a Decree, or carry it further, then it opens the Cauſe. *Paſch.* 1706. between *Vare* and *Wordall.*

## (N) Bill taken pro confeſſo.

1. IF the Defendant appears to the *Subpœna*, and prays a further Day to anſwer, and has it, and afterwards ſtands out all the Proceſſes of Contempt, the Bill will be taken *pro Confeſſo. Nel. Chan. Rep.* 8*vo.* 65.

2. But if the Defendant hath not appeared, the Court will not decree the Bill to be taken *pro Confeſſo*, but will order a Sequeſtration againſt his Real and Perſonal Eſtate, until he clears his Contempt. 2 *Chanc. Rep.* 283.

3. The Defendant being a Priſoner in the *King's Bench* refuſed to anſwer; whereupon it was prayed, that the Bill might be taken *pro Confeſſo*, if he did not anſwer by a certain Day; but the Court was of Opinion, that the Bill could not be taken *pro confeſſo*, unleſs the Defendant was in the Priſon of the Court; whereupon he was removed by *Habeas Corpus* into the *Fleet*, and having a Day given him to anſwer, and he ſtill refuſing, the Bill was taken *pro Confeſſo*, and he was ordered to be kept cloſe Priſoner. *Nel. Chanc. Rep.* 8*vo.* 50.

4. A Quaker being in Contempt for not anſwering upon Oath; and he being by Order brought to the Bar, my Lord Chancellor admoniſhed him of the Peril of Perſevering; but he ſtill refuſing to anſwer on Oath, the Bill was taken *pro Confeſſo.* 29 *Car.* 2. *Anonymus.* 2 *Chanc. Ca.* 237.

5. The Court of *Policies* and *Aſſurances* in *London* having decreed a Bill to be taken *pro Confeſſo*, after the firſt Summons, their Decree for this Reaſon was reverſed. 1 *Vern.* 223.

CAP.

# CAP. XIII.

# Bonds and Obligations.

(A) Concerning Bonds voluntarily entred into.

(B) When the Conſideration of Entring into a Bond fails, in what Caſes there ſhall be Relief in Equity.

(C) What ſhall be ſaid an illegal Conſideration, and herein of Bonds of Reſignation, criminal Converſation and ſuch as deprive a Man of the Benefit of the Law.

(D) Unreaſonable Bonds relieved againſt.

(E) Bonds given in Fraud of Marriage-Agreements, relieved againſt.

(F) Marriage-brokage Bonds, what ſhall be void as ſuch.

(G) Bonds obtained from young Heirs, in what Caſes to be relieved againſt.

(H) Bond and Penalty, in what Caſes moderated in Equity.

(I) In what Caſes a Defect in the Bond, or the Want of it will be ſupplied in Equity.

(K) Concerning Co-obligors and Sureties.

## (A) Concerning Bonds voluntarily entred into.

1. IF a Man enters voluntarily into a Bond, tho' there was no Conſideration; yet if there was no Fraud uſed in obtaining it, the Bond ſhall not be relieved againſt in Equity. 21 *Car.* 2. between *Wright* and *Moor*, 1 *Chan. Rep.* 157.

2. But a voluntary Bond ſhall not be paid in a Courſe of Adminiſtration, ſo as to take Place of Real Debts, though by ſimple Contract; but ſuch voluntary Bond ſhall be paid before Legacies. Decreed by *Harcourt* Lord *Chancellor*, between *Jones* and *Powell*.

## (B) When the Conſideration of Entring into a Bond fails, in what Caſes there ſhall be Relief in Equity.

1. IF a Leſſee aſſigns his Leaſe, and the Aſſignee, in Conſideration of ſuch Aſſignment, gives him a Bond of 300 *l.* conditioned to pay him 20 *l.* a Year, and the Rent to the Leſſor, and the Aſſignee ſuggeſts, that the Leaſe being forfeited (as in Truth it was) there is no Conſideration; yet if the Aſſignee may have the full Benefit of his Agreement, as he had in this Caſe, by the Leſſor's not taking Advantage of the Forfeiture, he ſhall have no Relief. Decreed 25 *Car.* 2. between *Powel* and *Morgan*, *Nel. Chanc. Rep.* 49.

2. If an Officer in the Army agrees to ſurrender his Commiſſion to *J. S.* in Conſideration of 100 *l.* for which a Bond is given, and he ſurrenders accordingly, and *J. S.* cannot get himſelf admitted, yet *J. S.* ſhall not have Relief againſt this Bond, ſave only againſt Intereſt and Coſts. Decreed *Mich.* 1682. between *Berriſford* and *Done*, 1 *Vern.* 98.

3. In a Bill to be relieved againſt four Bonds entred into by the Plaintiff's Teſtator to the Defendant, for quitting his Pretence, and procuring the Plaintiff's Teſtator to be admitted Purſer of one of the King's Men of War: It was held *per Cur'*, that the Bonds could not be ſet aſide, and that they could give no Relief, except for Intereſt and Coſts, on Payment of the Principal. *Hill.* 1693. between *Symonds* and *Gibſon*, 2 *Vern.* 308. Q. *of the Circumſtances of this Caſe, for no more of it appears in the Book.*

4. But where a Bond was entred into before the Wars, conditioned to pay 40 *l. per Annum*, for twelve Years, out of the Profits of an Office, which Office was taken away by the Uſurpers, but was again revived at the King's Reſtoration; and it was held, that the Obligor ſhould not be liable for more than the Time which the Office continued. Decreed 17 *Car.* 2. between *Lawrence* and *Braſier*, 1 *Chanc. Ca.* 72.

5. So if a Citizen of *London* is ſeiſed and poſſeſſed of Houſes of a publick Title, and likewiſe of a Perſonal Eſtate, and deviſes 10000 *l.* to his Daughters, and makes his Nephew Executor, who enters into a General Recognizance to the Chamberlain of *London*, for the Payment of the 10000 *l.* and the Lands of a publick Title, by the Reſtoration of the King, revert to the right Owner; and the Perſonal Eſtate by the Fire of *London* is very much leſſened, ſo that it is doubted, whether the Whole will make up the 10000 *l.* the Recognizance ſhall be made Uſe of no farther than to make good the Value of the Teſtator's Eſtate, over and above the Loſſes by Fire, and the King's Return. Decreed *Mich.* 22 *Car.* 2. between *Holt* and *Holt*, 1 *Chanc. Ca.* 190.

## (C) What ſhall be ſaid an illegal Conſideration, and herein of Bonds of Reſignation, criminal Converſation, and ſuch as deprive a Man of the Benefit of the Law.

1. IF a Man who has a Title to Lands applies himſelf to a Counſellor, to recover ſuch Lands, and the Counſellor refuſes, unleſs the Party will give him a Bond, conditioned to give him half the Land, when recovered, ſuch Bond ſhall be delivered up, and the Counſellor ſhall have no more than his reaſonable Charges. Decreed *Mich.* 32 *Car.* 2. between *Skapholme* and *Hart*, *Nel. Chan. Rep.* 477.

2. The Defendant, upon his Preſenting the Plaintiff to a Parſonage, took a Bond from him to reſign, which, though in it ſelf lawful, yet the Patron making an ill Uſe of it, *viz.* by preventing the Incumbent from demanding Tithes in Kind, the Court awarded a perpetual Injunction againſt the Bond. *Mich.* 1686. between *Durſton* and *Sandys*, 1 *Vern.* 411. *vid.* 1 *Vern.* 131. where it was ſent to be tried at Law, whether Bonds of Reſignation were (*a*) good, or not; my Lord Chancellor ſaying, that Precedents in the Caſe were not directly to the Point.

(*a*) Such Bonds have been held good in Law, where there appeared to be no Corruption or ſimoniacal Contract; and that a Man may bind himſelf to reſign, as in Caſe of Plurality, Non-reſidence, or till the Patron's Son is of Age, and qualified to take the Benefice; but if it had been for a Leaſe of the Glebe, or Tithes, or Sum of Money, that had been Simony within the Statute. *Vid. Cro. Eliz.* 180. *Cro. Jac.* 248.

3. The Guardian of an Infant preſented to a Living, and took a Bond from the Incumbent to reſign within two Months after Requeſt of the Patron or his Heirs, it being deſign'd that he ſhould have the Living himſelf, when capable; the Patron afterwards died an Infant at the Univerſity, leaving two Siſters, who were his Heirs, and they preſſed the Incumbent to reſign; and for not doing it, put the Bond in Suit, and recovered Judgment; and this Bill was brought to be relieved againſt the Bond and Judgment; and it was proved in the Cauſe, that they had treated with the Incumbent, to ſell him the perpetual Advowſon, and had ſaid, that if he would not give 700 *l.* for it, they would make him reſign. *Per* Lord *Keeper*, the Proof in this Caſe lies on the Defendant's Part, and unleſs they make out ſome good reaſon for removing him, I ſhall certainly decree againſt the Bond. Bonds for Reſignation have been held good in Law; the Statute of 31 *Eliz.* againſt Simony, made the Penalty upon the Lay Patron; and I do not remember any Caſe of Reſignation-Bonds before that Statute, and they have been allowed ſince, only to preſerve the Living for the Patron himſelf, or for a Child, or to reſtrain the Incumbent from Non-reſidence or a vitious Courſe of Life; and if any other Advantage be made thereof, it will avoid the Bond; and where it is general, for Reſignation, yet ſome ſpecial Reaſon muſt be ſhewn, to require a Reſignation, or I will not ſuffer it to be put in Suit; if it ſhould not be ſo, Simony will be committed without Proof or Puniſhment; a particular Agreement muſt be proved, to reſign for the Benefit of the Friend that would be preſented; and with-

out such Agreement the Bond ought not to be sued, but for Misbehaviour of the Parson; and here are Proofs in this Case of Endeavours to get Money out of the Plaintiff; and decreed a perpetual Injunction against the Bond, and Satisfaction to be acknowledged upon the Judgment; and the Plaintiff to give a new Bond of 200 *l.* Penalty to resign; but that not to be sued without Leave of the Court. *Mich.* 1701. between *Hilliard* and *Stapleton*.

4. If a Bond is given to a House-keeper for secret Service, and it does not appear she was a common Strumpet, Equity will not relieve against it. *Mich.* 1691. between *Bainbour* and *Maning*, 2 *Vern.* 242.

5. But if it appears that there was *Turpis Contractus*, and that the Woman used to Practice after that Manner, and used to draw in young Gentlemen, Equity will relieve. 1 *Vern.* 483. *vid.* 2 *Vern.* 187. where it is said, that tho' the Court may refuse Relief, when the Party who is culpable makes his Application; yet it is otherwise when his Executor sues.

6. The late *Marquis* of *Anandale* having had criminal Conversation with the Defendant, his House-keeper, for two Years, and having a Child by her, who afterwards died, the Marquis gave a Bond of 4000 *l.* Penalty, conditioned to pay her 2000 *l.* within three Months after his Death; and sometime after the Marquis executed a Deed, whereby he agreed, either to pay the 2000 *l.* or to lay it out in an Annuity, and settle it on the Defendant *Harris* and her Child; and the Marquis being dead, and this Bond put in Suit, this Bill was brought to be relieved against the Bond, as being given *pro Turpi causa*; and the Defendant's Cross Bill was for a Discovery of Assets, and Payment of the 2000 *l.* and the Court dismissed the original Bill, and decreed an Account and Satisfaction for the Defendant on her Cross Bill, as being *Præmium Pudoris*; and a Case was cited of *Ord* and *Blackett*, where Mrs. *Ord* a young Lady of about fourteen Years of Age, and intitled to 12000 *l.* Fortune, was seduced by Sir *William Blackett*, who settled on her 300 *l. per Annum* for Life; and the young Lady had a Decree for the 300 *l.* as *Præmium Pudicitiæ*; so in a like Case in the Exchequer about a Year ago, where a Man having debauched a young Woman, and intending afterwards to put a Trick on her, made a Settlement upon her of 30 *l.* a Year for Life, out of an Estate which he had nothing to do with; yet the Court decreed him to make it good out of an Estate which he had of his own. This Decree was afterwards affirmed on Appeal to the House of Peers. *Hill.* 1727. between the *Marchioness* of *Anandale* and *Harris*.

7. If a Man who is made Tenant in Tail enters into a Recognizance not to suffer a Recovery, such Recognizance shall be delivered up, as creating a Perpetuity. *Moor* 869. Adjudged upon a Reference to the Judges out of Chancery.

8. So if one settles his Land upon his Daughter in Tail, and takes a Bond from her not to commit Waste, and the Daughter levies a Fine, and commits Waste, and the Bond is put in Suit; yet Equity will relieve against it. *Hill.* 1691. between *Jervis* and *Bruton*, 2 *Vern.* 251.

9. But where the Father settled Lands on his Son in Tail, and took a Bond from him, that he should not dock the Intail. On a Bill to be relieved against the Bond, it was decreed to be good; for if the

the Son would not have given the Bond, the Father might have only made him Tenant for Life. *Trin.* 1691. between *Freeman* and *Freeman*, 2 *Vern.* 233.

## (D) Unreaſonable Bonds relieved againſt.

1. THE Plaintiff, for 90 *l.* lent, got a Bond of 800 *l.* from the Defendant, when he was drunk, and had Judgment thereon; the Defendant, in Right of his Wife, was intitled to certain Lands that were eſtated in other Perſons in Law, in Truſt for her; the Bill was to have thoſe Lands ſubjected to the Plaintiff's Satisfaction here, in as much as the Defendant was intitled to the Truſt in the Right of his Wife; but the Court would not give the Plaintiff any Relief, not ſo much as for the Principal he had really (*a*) lent; and the Bill was diſmiſs'd. *Paſch.* 23 *Car.* 2. between *Rich* and *Sydenham*, 1 *Chanc. Ca.* 202.

(*a*) But if the Defendant, in this Caſe, had come into Equity, to ſet aſide the Judgment for Fraud, Equity would have obliged him to pay the Plaintiff what was really lent, according to that Maxim, *He that would have Equity done him, muſt do it to others.*

2. A Man who had fallen out with his Mother, ſettled his Manſion-houſe on his Brother, but firſt took a Bond from him in his Siſter's Name, that the Brother ſhould not permit his Mother to come into the Houſe; and the Bond was decreed to be ſet aſide. *Mich.* 1686. between *Traitor* and *Traitor*, 1 *Vern.* 413.

## (E) Bonds given in Fraud of Marriage Rights and Agrements relieved againſt.

1. IF *A.* on a Treaty of Marriage of his Siſter with *B.* lets her have 160 *l.* privately, that her Fortune may appear as much as was inſiſted upon by *B.* and takes her Bond to repay it, and the Executor of *A.* puts the Bond in Suit againſt the Executor of the Siſter, who ſurvived the Husband, the Bond ſhall be given up as fraudulent. Decreed between *Gale* and *Lendo*, 1 *Vern.* 475. *Note*; It is laid down as a Rule in Equity, that where the Son, without the Privity of the Father or Parent treating the Match, gives a Bond to refund any Part of the Portion, it is void. 1 *Salk.* 156.

2. If on a Treaty of Marriage between *A.* and the Daughter of *B.* the Mother of *A.* ſurrenders Part of her Jointure to enable her Son to make a Settlement, and *B.* agrees to give his Daughter 3000 *l.* Portion; and *A.* without the Privity of his Mother, gives a Bond to *B.* to pay back 1000 *l.* at the End of ſeven Years, the Bond ſhall be delivered up as obtained in Fraud of the Marriage-Agreement. Decreed *Mich.* 1718. between *Turton* and *Benſon*, 2 *Vern.* 764.

3. But where a Son, in Conſideration of 3500 *l.* which he was to have as a Marriage-Portion with *B.* his intended Wife, covenanted that his Father would ſettle 300 *l. per Ann.* on her as a Jointure; and the Father ſettled it accordingly; and the Son gave a Bond, to leave his Wife 1000 *l.* if ſhe ſurvived him; the Son died, and the Father pretended the Wife ought not to have any Benefit of this Bond, for that it was in Fraud of the Marriage-Agreement; and cited the Caſe of Sir *Nicholas Butler* and Sir *Henry Chancy*, where, on the Mar-

riage of Sir *Henry*'s Son with Sir *Richard*'s Daughter, it was agreed, that the young Couple ſhould have ſo much for preſent Maintenance; the Son privately agrees with his Father to releaſe Part of it; and that was ſet aſide, tho' there the Son, as was ſaid, gave nothing but his own, and he might diſpoſe of his preſent Maintenance as he thought fit; ſo here the Son gives nothing but his own Money: But *Per Cur'*, the Caſes are not alike; there the Father was Party to the Articles, and deceived by the under-hand Agreement contrary to the Articles; but here the Son is only Party to the Articles, and was to have all the Portion, and might give it as he pleaſed; and decreed that there ſhould be no Relief. *Mich.* 1699. between *Gifford* and *Gifford*.

6. If a Bond is given in common Form for the Payment of Money; but proved that the Conſideration was, that the Obligor ſhould marry ſuch a Man, or ſhould pay the Money due on the Bond, the Court will relieve againſt it, for Marriage ought to be free, and without Compulſion. Adjudged *Trin.* 1689. between *Key* and *Bradſhaw*, 2 *Vern.* 102.

7. So if *A.* being a Widow, gives a Bond to *B.* of 100 *l.* if ſhe marry again, and *B.* gives a Bond to the Widow, to pay her Executors the like Sum, if ſhe ſhould not marry again; and the Widow ſoon after marries, her Bond ſhall be delivered up. Decreed *Hill.* 1690. between *Baker* and *White*, 2 *Vern.* 215.

## (F) Marriage-Brocage Bonds, what ſhall be void as ſuch.

1. IF *A.* gives *B.* a Bond of 100 *l.* for procuring him a Wife, which is effected accordingly, ſuch Bond ſhall be cancelled. *Toth.* 27. 1 *Chan. Rep.* 87. *S. P.* Decreed 3 *Chan. Rep.* 31. *S. P.* decreed.

2. The Plaintiff gave a Bond to the Defendant, conditioned, in Effect, that if the Plaintiff married *J. S.* then the Plaintiff to pay a certain Sum of Money; the Defendant procured the Marriage, and put the Bond in Suit; but it was decreed to be delivered up, the young Gentlewoman having 2000 *l.* Portion, and the Man being *ſixty* Years of Age, and having *ſeven* Children. *Paſch.* 2 *Jac.* 2. between *Drury* and *Hook*, 2 *Chan. Ca.* 176. 1 *Vern.* 412. *S. C.*

3. It was decreed in Chancery, that a Bond of 1000 *l.* Penalty, for the Payment of 500 *l.* given for the Procuring a Marriage between Perſons of equal Rank, Fortune, *&c.* was good; but upon an Appeal to the Houſe of Lords, the Decree was reverſed; for that ſuch Bonds to Match-Makers are of dangerous Conſequence, and tend to the Betraying and Ruining Perſons of Fortune and Quality, and are not to be countenanced in Equity; and that Marriage ought to be procured by the Mediation of Friends and Relations; and that ſuch Bonds would be of evil Example to Executors, Guardians, Truſtees, Servants and others, who have the Care of Childreen. Between *Hall* and *Potter*, *Show. P. C.* 76.

4. Mr. *Dairell*'s Maid had prevailed with his Niece (who was about fifteen Years old, and lived in the ſame Houſe with him, and was intitled to a good Fortune) to marry his Journey-man, without the Conſent or Knowledge of her Uncle; and for the good Offices ſhe was to do him in that Affair, he had given her a Bond of 100 *l.* condi-

tioned to pay her fifty *Guineas* at ſix Months End; and after he had got the Niece's Good-will, by the Help of this Maid, and ſhe had been prevailed with to go into a Hackney-Caoch with him, in order to marry him, he gave the Maid fifty *Guineas* more; the Marriage was had, and the Bond not being paid, was put in Suit, and Judgment obtained on it; and this Bill was brought againſt the Defendants, (the Maid having married *Bruning*) to be relieved againſt this Bond, and to have the fifty *Guineas* repaid, for that the Bond was entered into, and the Money given for no good Conſideration, but only on Account of this Marriage Brokage: And the Maſter of the *Rolls* decreed the Bond to be given up, and Satisfaction to be acknowledged on the Judgment, and the fifty *Guineas* received to be repaid; and if it were not done on Service of the Order, the Defendants were to pay Coſts; and this notwithſtanding the Husband inſiſted by his Anſwer, that he look'd upon this as his Wife's Fortune, and had married her in Proſpect of it; and this Decree was affirmed by my Lord Keeper *Wright*. *Mich.* 1700. between *Goldſmith* and *Bruning*.

5. If a Bond is given to a Father, in order to obtain his Conſent to the Marriage of his Daughter, to repay Part of the Portion, if the Daughter died without Iſſue, where the Daughter was intitled to her Portion by a collateral Anceſtor, the Bond will be ſet aſide as a Marriage-brokage Bond. Decreed *Mich.* 1707. between *Keat* and *Allen*, 2 *Vern.* 588.

6. If the Mother, who is Guardian to her Daughter, takes a Bond from the Husband, to give her a Releaſe within two Years after the Marriage, ſuch Bond is of the ſame Nature with a Marriage-brokage Bond, and ſhall be delivered up; for there is no Difference between giving a Bond for procuring a Marriage, and a Bond to releaſe Part of what became due. Decreed 8 *Ann.* between Duke *Hamilton* and Lord *Mohun*, 2 *Vern.* 652. 1 *Salk.* 158. *S. C.*

## (G) Bonds obtained from young Heirs, in what Caſes to be relieved againſt.

1. IF *A.* lends *B.* and *C.* 200 *l.* and they enter into a Bond to him of 1000 *l.* to pay him 800 *l.* within three Months after either of their Fathers died, or they were married. *C.*'s Father dies, and *B.* marries, and his Portion is in the Hands of Truſtees, *A.* ſhall not ſubject the Portion for the Payment of the Debt, it being an (*a*) unreaſonable Security. 3 *Chan. Rep.* 75.

(*a*) Thoſe hazardous Bargains with young Heirs, to have double or treble the Sum lent, after the Death of their Father, or a Tenant for Life, or ſome other Contingency, are not always ſet aſide in Equity, by Reaſon of Neceſſity or Prodigality in them; for then it would be very difficult to deal with any young Heir, in the Life of his Anceſtor; but if they appear to be very unreaſonable, or are attended with Badges of Fraud, which are the Things which muſt in all Caſes govern them; then they are regularly ſet aſide; but then it muſt be by Paying what was *bona fide* lent, together with Intereſt, in moſt Caſes, if the Obligor applies for Relief; but in Caſe the Obligee applies, he ſhall have no Aſſiſtance, nor even to recover what was really lent, becauſe that would be to aſſiſt Fraud in Equity. *Vide* 1 *Vern.* 141. 2 *Vent.* 359.

2. A young Gentleman, and two others, imployed one *B.* to borrow 500 *l.* *B.* imployed *C.* who ſpoke to *D.* a Silkman, and bought of him Silks for 500 *l.* *A.* gave a Bond and Judgment for the Money, and *B.* ſold the Silks for 250 *l.* and kept 50 *l.* for his own

and *C.*'s Pains, and paid but 200 *l.* to *A.* and it was decreed that the Bond ſhould be given up upon Payment of the 200 *l.* and Intereſt; but the Reporter makes a *Quære* as to Intereſt. 28 *Car.* 2. between *Waller* and *Dalt*, 1 *Chan. Ca.* 276. *Nel. Chan. Rep.* 314. *S. P.* decreed; and the Court would not give Intereſt.

3. The Defendant being an Exchange-Man had for many Years paſt practiſed on young Heirs, by ſelling them Goods at extravagant Values, and to be paid Five for One, and more, on the Death of their Fathers; and had in that Manner obtained from the Plaintiff and two other young Gentlemen, that were Heirs to good Eſtates, ſeveral Securities, wherein they were bound ſeverally and jointly in 4000 *l.* for Payment of great Sums of Money; and the Court decreed the Plaintiff's Security to be given up, on Payment of what the Defendant really and *bona fide* paid to him alone, and for his own proper Uſe. Between *Bill* and *Price*, 1 *Vern.* 467.

4. *A.* Tenant for Life, Remainder to his firſt Son in Tail, Remainder to his Nephew *B.* *B.* enters into ſeveral Statutes to *C.* for Payment of Ten for One upon the Death of *A.* in Caſe he died without Iſſue Male in the Life of *B.* *C.* in the Life of *A.* brings a Bill to compel *B.* either to pay the Principal and Intereſt, or be foreclоſed any Relief againſt the Bargain; *B.* by Anſwer declares the Bargain fairly made, and intends to abide by it, and that he would ſeek no Relief againſt it. *A.* dies, and *C.* being dead, *B.* brings his Bill againſt the Executor of *C.* and notwithſtanding *B.*'s former Anſwer, he is relieved againſt the Bargain on Payment of Principal and Intereſt without Coſts; and my Lord *Chancellor* declared, that there being no further Proceeding than the Bill and Anſwer, that was only to double Hatch the Cheat. Decreed *Hill.* 1690. between *Wiſeman* and *Beake*, 2 *Vern.* 121.

## (H) Bond and Penalty, in what Caſes moderated in Equity.

1. IF the Obligee has received the greateſt Part of the Money due on the Bond, at the peremptory Time and Place, and will nevertheleſs extend the whole Forfeiture immediately, refuſing, ſoon after the Default, to accept of the Reſidue tendred to him, the Obligor may find Aid in Chancery. *Cary* 2.

2. If the Plaintiff gives the Defendant a Bond of 50 *l.* not to diſparage his Trade, and the Plaintiff afterwards ſeeing a Cuſtomer of the Defendant's cheapning a Parcel of *Flounders*, ſays unto him, *Why would you buy of the Defendant, theſe Fiſh ſtink*; and the Defendant puts the Bond in Suit, and has a Verdict, Equity will not relieve, becauſe of the Smallneſs of the Sum: But *per* Lord *Keeper*, it would be otherwiſe, were the Penalty greater, as 100 *l.* or upwards. *Mich.* 22 *Car.* 2. between *Tale* and *Ryland*, 1 *Chan. Ca.* 283.

3. The Plaintiff being in Execution, the Defendant would not diſcharge him without Payment of the (*a*) Penalty of the Bond, which he having done, the Court decreed the Defendant to refund all, except Principal, Intereſt and Coſts. *Nel. Chan. Rep.* 437.

(*a*) But now by the 4 & 5 *Ann. cap.* 16. the Defendant, pending any Action on a Bond, may bring in Principal, Intereſt and Coſts in Law and Equity, and the Court ſhall give Judgment to diſcharge him.

4. If

4. If one is bound by Bond to transfer 300 *l. East-India* Stock, before *September* the 30th then next, though the Stock is much riſen; yet the Defendant ſhall be decreed to transfer the 300 *l.* Stock *in Specie*, and to account for all Dividends from the Time that it ought to have been transferred. Between *Gardner* and *Pullen*, 2 *Vern.* 394.

5. If the Vendor of Lands enters into a Recognizance of 1000 *l.* Penalty, for the quiet Enjoyment of the Vendee, tho' the Loſs the Vendee ſuſtains by having the Land evicted be much greater; yet the Court will not go beyond the Penalty of the Bond. 1 *Chan. Rep.* 95.

6. So if a Maſter of a Ship covenants with the *East-India* Company to pay a certain Mulct for every Cloth, *&c.* carried in the Ship, and the Maſter takes *J. S.* as his Mate, who makes the like Agreement with him, *mutatis mutandis*, and gives a Bond of 50 *l.* Penalty, that he ſhould not carry Cloth, *&c.* tho' *J. S.* without the Knowledge of the Maſter, carries ſo many Cloths that the Mulct came to 70 *l.* and the Maſter is obliged to pay it; yet he ſhall not, on his own Application, charge *J. S.* for more than the Penalty of the Bond. 1 *Chan. Ca.* 226.

7. So where there was a Settlement or Deviſe for Payment of Debts, and there was a Bond-Debt due, the Intereſt of which had out-run the Penalty, altho' ſuch Conveyances for Payment of Debts are conſtrued favourably; yet the Creditor on a Bill brought by him could not have more than the Penalty. 1 *Salk.* 154. decreed; for *note*, That where an Obligee is Plaintiff, a Court of Equity will not carry the Debt beyond the Penalty, becauſe he has choſen his own Security; but it is otherwiſe as to the Obligor, for he who ſeeks Equity from him, muſt do it to him; and therefore,

8. If Lands are extended on a Statute or Judgment at much leſs than the real Value, and the Conuſor will come into Equity, to make the Conuſee Account according to the real Value, he ſhall not be relieved without paying the Conuſee all that is due to him for Principal, Intereſt and Coſts, tho' they exceed the Penalty. 1 *Vern.* 350. So if the Obligee be delayed by Injunction. 1 *Vern.* 35.

9. So where the Plaintiff came to be relieved againſt the Penalty of a Bond, though it was ſo decreed; yet it was, on the Payment of Principal, Intereſt and Coſts; and tho' they (*b*) exceeded the Penalty, yet the Decree was affirmed in the Houſe of Peers. *Show. P. C.* 15.

(*b*) And this ſeems to be the Reaſon why an Obligee, who enters up Judgment, but does not take out Execution, ſhall, notwithſtanding, have Principal and Intereſt from the Time of Entring up the Judgment; for though, after Judgment entred, he is not intitled to Intereſt at Law, yet as he is intitled to the Penalty by Law, Equity will not relieve againſt it, without paying Principal, Intereſt and Coſts.

## (I) In what Caſes a Defect in the Bond, or the Want of it, will be ſupplied in Equity.

1. IF one of the Obligors Names is omitted by the Scrivener to be inſerted in the Bond, and yet he ſigns and ſeals the Bond, ſuch an Accident is proper to be relieved againſt in Equity. *Per Cowper* Lord Chancellor. 3 *Chan. Rep.* 99.

2. If for 200 *l.* borrowed the Obligor enters into a Penal Bond for 400 *l.* but the Clerk, inſtead of *Quadringenta Libris* writes *Quadraginta Libris*, yet it ſhall be good. 2 *Chan. Ca.* 225.

3. If a Bond is taken away fraudulently, and cancelled, the Obligee ſhall have as much Benefit by it as if it were not cancelled. *Nel. Chan. Rep.* 184.

4. If a Grantee in a voluntary Deed, or Obligee in a voluntary Bond, loſe the Deed or Bond, they ſhall have Remedy againſt the Grantor or Obligor in Equity. 1 *Chan. Ca.* 77. *Quære*, for theſe Matters are diſcretionary.

5. *J. S.* a little before his Death, entered into a voluntary Bond to his Houſe-keeper for the Payment of an Annuity of 30*l. per Ann.* and the Bond being loſt, his Repreſentatives were decreed to pay the Annuity, or the Penalty of the Bond, though it appeared that there were no Wages due to her. *Hill.* 1700. between *Lightebone* and *Weeden.*

## (K) Concerning Co-obligors and Sureties.

1. IF two are bound jointly, and one dies, the Survivor only is liable in Equity; but it is otherwiſe if they were bound jointly and ſeverally. 2 *Vern.* 99. *per Cur'.*

2. An Obligee ſhall have Remedy againſt a Surety where the Bond is loſt, eſpecially if the Money was lent on the Surety's Credit. 1 *Chan. Ca.* 77.

3. But if upon the Taking out Adminiſtration, two are bound as Sureties, and afterwards the Sureties take up their Bond, and procure the Prerogative Court to take inſufficient Security; yet they ſhall not be any further chargeable in Equity than in Law. Between *Ratcliffe* and *Groves*, 1 *Vern.* 196. that a Surety ſhall not be further liable in Equity than at Law. *Vide* 2 *Chan.* 22.

4. If the Principal in a Bond, being arreſted gives Bail, and Judgment is had againſt the Bail, and the Sureties are afterwards ſued on the original Bond, and are obliged to pay the Money, the Sureties ſhall have the Judgment againſt the Bail aſſigned to them, in order to re-imburſe them what they had paid, with Intereſt and Coſts; and the Sureties in the original Bond are not to be contributory, for the Bail ſtands in the Place of the Principal. *Paſch.* 1708. between *Parſons* and *Priddock*, 2 *Vern.* 608.

5. A Bond-Creditor ſhall, in this Court, have the Benefit of all Counter-bonds or collateral Security given by the Principal to the Surety; as if *A.* owes *B.* Money, and he and *C.* are bound for it, and *A.* gives *C.* a Mortgage or Bond to indemnify him, *B.* ſhall have the Benefit of it to recover his Debt. *Mich.* 1692. between *Maure* and *Harriſon.*

6. If *A.* be bound in a Bond for Payment of Money, and *B.* be bound with him as his Surety only, and the Bond happens to be loſt, Equity will ſet up the Bond, as well againſt a Surety as againſt the Principal, becauſe the Bond was once a legal Charge againſt both. Decreed 1700. between *Sheffield* and Lord *Caſtleton.*

# CAP. XIV.

# Charity.

(A) What ſhall be a good charitable Uſe.

(B) What ſhall be a ſuperſtitious Uſe, or a Charity, to which the King is intitled.

(C) Where a Defect, with reſpect to the Lands or Goods appointed, or the Perſons to take, ſhall be ſupplied in Favour of a Charity.

(D) What ſhall be ſaid to be appointed to a Charity, and whoſe Perſons and Eſtates made liable.

(E) What ſhall be a Miſ-imployment of a Charity, as by altering it from the Donor's Intentions; not increaſing the Rents as the Price of Things increaſes, &c.

(F) Concerning Commiſſioners of Charitable Uſes.

## (A) What ſhall be a good Charitable Uſe.

1. IF a School-Houſe is erected by the voluntary Contributions of the Inhabitants of *A.* on the Waſte of the Lord of the Manor, and the Lord infeoffs Truſtees in Truſt that the Inhabitants of *A.* may for ever have a School, as of the Gift of the Lord of the Manor; this is not a Free-School, and ſo not a Charity within the Statute of 43 *Eliz.* for which the Inhabitants have a Right to ſue in the *Attorney General*'s Name. 2 *Vern.* 387.

2. So if the Lord of a Manor ſhould erect a Mill, and convey it to Truſtees, to the Intent that the Inhabitants might have the Convenience of Grinding there; this would not be a Charity within the (*a*) Statute; *per L. Keeper*, 2 *Vern.* 387.

(*a*) The 43 of *El. cap.* 4. Enacts, That the Commiſſioners ſhall enquire of the following Uſes as good and charitable, *viz.* for Relief of aged and impotent, and poor People; for Maintenance of ſick and maimed Soldiers, Schools of Learning, Free-Schools, Scholars in Univerſities, Houſes of Correction; for Repairs of Bridges, of Ports and Havens, of Cauſways, of Churches, of Sea-banks, of Highways; for Education and Preferment of Orphans, for Marriage of poor Maids, for Supportation and Help of young Tradeſmen, of Handicrafts-men, of Perſons decay'd; for Redemption or Relief of Priſoners or Captives, for Eaſe and Aid of poor Inhabitants concerning Payment of Fifteenths, ſetting out of Soldiers, and other Taxes for other Things within the Purview of the Statute. *Vide Duke's Char. Uſes*, 109.



3. If

3. If Money is given to maintain a preaching Miniſter, though this is no Charitable Uſe (*a*) mentioned in the Statute; yet *per L. Keeper* and two Judges, it is within the Equity of the Act; and it was ordered to be paid accordingly. *Pop.* 139.

(*a*) A Gift of Lands, *&c.* to a Chaplain or Miniſter, to celebrate Divine Service, is neither within the Letter, nor Meaning of this Statute; for it was on Purpoſe omitted in the Penning of the Act, leſt the Gifts intended to be imployed upon Purpoſes grounded on Charity, might in Change of Times, contrary to the Minds of the Givers, be confiſcate into the King's Treaſury; for Religion being variable, according to the Pleaſure of ſucceeding Princes, that which at one Time is held for Orthodox, may at another be accounted ſuperſtitious; and then ſuch Lands are forfeited, as appears by the Statute of 1 *E.* 6. *c.* 14. Sir *Fran. Moor*'s Reading on the Statute 43 *Eliz. c.* 4. but it has been ruled otherwiſe; for *ſumma eſt Ratio quæ pro Religione facit.*

4. An Impropriator deviſed to one that ſerved the Cure, and to all that ſhould ſerve the Cure after him, all the Tithes and other Profits, *&c.* tho' the Curate was incapable of taking by this Deviſe, in ſuch Manner, for want of being incorporate and having Succeſſion, yet my L. *Finch* held, that the Heir of the Deviſee ſhould be ſeiſed in Truſt for the Curate for the Time being. 2 *Vent.* 349.

5. A Deviſe of Lands to the Company of *Leather-Sellers* in *London*, to maintain a Charitable Uſe there, was upon an Appeal to my L. Chancellor held good, notwithſtanding the Statute of Wills prohibits the Deviſing to a Corporation in Mortmain; and there ſaid that there were ſeveral Precedents of the Kind. *Duke's Char. Uſes* 80.

6. So if there be a Deviſe to the Principal, Fellows and Scholars of *Jeſus College* in *Oxon*, and their Succeſſors, to find a Scholar of his Blood; though this Deviſe be void in Law, becauſe the Statute of 34 *H.* 8. of Wills diſallows of Deviſes to Corporations in Mortmain; yet it ſhall be good, as a Limitation and Appointment to a Charity, within the 43 *Eliz. De Layd's* Caſe, *Hob.* 136.

7. So where a Deviſe was of Lands to *Trinity College* in *Cambridge*, for the Maintenance of a Fellow there; and if any Cavil ſhould hinder this Deviſe, or that the ſame cannot go to the College by Reaſon of the Statute of Mortmain, then he deviſed the ſame to *S. S.* and his Heirs; and upon an Information exhibited by the *Attorney General*, to have this Land eſtabliſhed in the College, it was decreed accordingly, notwithſtanding the ſaid Statute and the ſaid Clauſe in the Will. 1 *Lev.* 284. The *King* verſus *Newman in Can'*.

## (B) What is a ſuperſtitious Uſe, or a Charity, to which the King is intitled.

1. IF any Lands, Tenements, Rents, Goods, Chattels, *&c.* have, or ſhall be given towards the Finding a Stipendiary Prieſt, for Maintenance of an Anniverſary or Obit, Lamps or Torches, *&c.* to be uſed at certain Times, to help to ſave the Souls of Men out of ſuppoſed Purgatory: Theſe are ſuperſtitious Uſes, which are given to the King. *Vide* the Statute 1 *E.* 6. *cap.* 14. *Cro. Jac.* 51. 4 *Co.* 104. *Duke's Char. Uſes* 106.

2. But if there be a Charitable Uſe intermixed with the Superſtitious Uſe, ſo that they may be diſtinguiſhed, there the King ſhall have only ſo much as is given to the Superſtitious Uſe. 4 *Co.* 104.

3. If Lands are given upon Condition to find a Prieſt, this is a Superſtitious Uſe within the Words. 4 *Co.* 104.

4. If

4. If Lands are limited to a Man's Kindred, to pay certain Sums of Money to Superſtitious Uſes, the King ſhall have the Lands; but if it had been ſo limited, that his Friends or Kindred ſhould have the Reſidue of the Profits above the Superſtitious Uſe, this had ſaved the Land. *Duke's Char. Uſes* 106. and the King ſhould only have the Sums of Money thus limited.

5. If One gives 20 *l. per Ann.* for the Finding of a Prieſt, and appoints to the Prieſt 10 *l. per Ann.* in this Caſe all ſhall go to the King, for the Reſidue ſhall be intended for the Finding of Neceſſaries; otherwiſe it is, if a Condition be annexed to the Gift to give 10 *l. per Ann.* to a Prieſt: For there the King ſhall have but 10 *l.* *Duke's Char. Uſes* 107.

6. An Inquiſition having found that one *A.* had deviſed to *J. S.* and her Heirs, abſolutely, without any Truſt that ſhe did it for the Good of her Soul; and that the Deviſee owned that this Eſtate was not hers, but belonged to God and his Saints: And the Court of *K. B.* held that this could not be averred to be a Superſtitious Uſe, by Reaſon of the Statute of Frauds; and ſaid, that a *Monk* may take now by Purchaſe, and ſeemed to think ſo of a *Nun*: But an Information being preferred in the Exchequer for a Diſcovery, and an Application of the Deviſe to an Uſe truly charitable, it was held that the Statute of Frauds did not bind the King; that he, as Head of the Commonwealth, is intruſted and impowered to ſee that nothing be done to the Diſheriſon of the Crown, or the Propogation of a falſe Religion; and to that End intitled to pray a Diſcovery of a Truſt to a Superſtitious Uſe: And that this being a Superſtitious Uſe, the King ſhall order it to be applied to a proper Uſe. 4 *W. & M.* between the *King* and Lady *Portington*, 1 *Salk.* 162.

7. If a Charity is deviſed to the Poor indefinitely, the King ſhall have the Diſpoſal thereof. *Nel. Chan. Rep.* 245.

8. *A.* having deviſed 1000 *l.* to be applied to ſuch Charitable Uſes as he had by Writing under his Hand formerly directed, and no ſuch Writing being to be found, it was held that the King ſhould appoint, who gave it to the *Mathematical* Boys in *Chriſt's Hoſpital*; which was decreed accordingly; and that the Parties ſhould be indemnified from the Writing referred to. *Hill.* 1683. between the *Attorney General* and *Syderfin*, 1 *Vern.* 224.

9. *A.* being a beneficed Clergyman, deviſed 600 *l.* to Mr. *Baxter*, to be diſtributed by him to ſixty *pious ejected Miniſters*, and adds that he did not give it them for the Sake of their Nonconformity, but becauſe he knew many of them to be pious and good Men, and in great Want: He alſo gave Mr. *Baxter* 20 *l.* and 20 *l.* more to be laid out in a Book of his, Intitled, *Baxter's Call to the Unconverted.* And it was held by *North L. K.* that this was a Superſtitious Uſe, which though void, yet the Charity is good, and ſhall be applied *in eodem genere*; and therefore decreed it for the Maintenance of a Chaplain for *Chelſea College*. *Trin.* 1684. between the *Attorney General* and *Baxter*, 1 *Vern.* 248. But this Decree was reverſed, 1 *W. & M.* by the Lords Commiſſioners. 2 *Vern.* 105.

10. *A.* deviſed a Salary for Maintenance of Independent *Lectures* in three Market-Towns, and deviſed the Eſtates thus charged to his Nephew, who afterwards deviſed it for the Payment of his Debts; a Bill was brought to have the Lands ſold for Payment of the Debts; and afterwards upon an Information for the Charity, the growing

Payments and Arrears were decreed, and the Independent Lectures changed into *Catechiſtical* Lectures in the ſame three Market-Towns; and this, though there was not ſufficient to pay the Debts. *Combe*'s Caſe, ſaid to be decreed 1679. 2 *Vern.* 267.

11. *A.* by Will charged his Eſtate with an Annual Sum for the Maintenance of *Scotchmen* in the Univerſity of *Oxon*, to be ſent into *Scotland* to propagate the Doctrine of the Church of *England* there; and *Presbyters* being ſettled in *Scotland* by Act of Parliament, the Queſtion was, whether this Deviſe ſhould be void, and ſo fall into the Eſtate and go to the Heir; or ſhould be applied *Cy Pres*; but there is no Reſolution. *Paſch.* 1692. between the *Attorney General* and *Guiſe*, 2 *Vern.* 266.

## (C) Where a Defect with Reſpect to the Lands, Goods, &c. appointed, or the Perſons to take, ſhall be ſupplied in Favour of a Charity.

1. AN Appointment of Lands to a Charity will be good though there be neither Livery of Seiſin nor Attournment. *Duke*'s *Char. Uſes* 109, 110.

2. If a Debt owing by Statute, Bond, Judgment, or Recognizance, which in Law is a Thing in Action, is given for the Creation of a Free-School, this ſhall be a good Appointment within the Statute to maintain a Charitable Uſe: Decreed, 3 *Car.* 1. *Duke*'s *Char. Uſes* 79.

3. If Copyhold Lands are deviſed to a Charity, they ſhall paſs without any Surrender, and ſhall bind the Heir; but the Lord ſhall not loſe his Fine. *Duke*'s *Char. Uſes* 110.

4. Tenant in Tail may deviſe Lands to a Charity, and ſuch Deviſe ſhall be good, though there was neither Fine or Recovery. *Duke*'s *Char. Uſes* 100. 2 *Vern.* 453. *S. P.* decreed.

5. If a Feme Covert Adminiſtratrix deviſes to a Charity, it ſhall be good. *Damus*'s Caſe, *Moor* 822.

6. But if an Infant, Lunatick or Feme Covert, do by Will or by Deed give any Thing to a Charitable Uſe, it ſhall be void. *Duke*'s *Char. Uſes* 110.

7. If *A.* deviſe Freehold Lands to a Charity, but the Will is not executed in the Preſence of three Witneſſes, according to the Statute of *Frauds*, this Will being void ſhall not operate as an Appointment. *Mich.* 1707. *Attorney General* verſus *Barnes*, 2 *Vern.* 597. 1 *Salk.* 163. *S. P.*

8. If Lands are given to Church-Wardens of a Pariſh to a Charitable Uſe, although the Deviſe be void in Law, they not having a Corporation capable of taking in Succeſſion; yet they ſhall be capable for this Purpoſe: Decreed. *Duke*'s *Char. Uſes* 82.

9. If Lands are deviſed to a Corporation by a wrong Name, as to the *Mayor* and *Chamberlain*, inſtead of Mayor and Commonalty; yet as the Intent of the Teſtator appears, it ſhall be good. *Mayor* of *London*'s Caſe, *Duke*'s *Char. Uſes* 83.

10. If Money is given to a Pariſh generally, it ſhall be intended to be to the Poor of the Pariſh. 1 *Chanc. Ca.* 134.

11. Money was given for the Good of the Church of *Dulk*; and this was reſolved to be a good Gift, notwithſtanding theſe general Words. *Duke's Char. Uſes.*

12. If one deviſe Lands to *A.* for Life, Remainder to the Church of St. *Andrew's* in *Holborn*; in this Caſe the Parſon of the Church ſhall have this Remainder. *Duke's Char. Uſes.*

## (D) What ſhall be ſaid to be appointed to a Charity, and whoſe Perſons and Eſtates made liable.

1. IF one deviſes the Rents of his Land to a Charitable Uſe, by this the Land itſelf is deviſed; ſo a Deviſe of the Rents and Profits. *Duke's Char. Uſes* 112.

2. If a Man who has made a Leaſe of his Lands, deviſes the Rent to a Charity, this ſhall be conſtrued largely for a Deviſe of the Rent then reſerved, or afterwards to be reſerved on an improved Value. *Duke's Char. Uſes* 71.

3. If *A.* ſeized of a Manor of the Yearly Value of 240 *l.* deviſes ſeveral Legacies, and particularly to his Heir at Law 40 *s.* and then adds, *That being determined to ſettle for the Future, after the Death of me and my Wife, the Manor of* F. *with all Lands, Woods and Appurtenances, to Charitable Uſes, I deviſe to* M. N. &c. *upon Truſt that they ſhall pay yearly, and for ever, ſeveral particular Sums to Charitable Uſes, amounting in the Whole to* 120 *l.* per Ann. and gives the Truſtees ſomething for their Pains: And there being an Overplus, it was decreed to go in Augmentation of the Charities, it appearing to be the Teſtator's Intent to ſettle the whole Manor; and that the Heir ſhould have no more than the 40 *s.* Between *Arnold* and *Attorney General, Show. P. C.* 22. *in Domo Proc.* affirmed on Appeal.

4. If two Executors jointly intermeddle with the Receipt of Money, and one truſts the other with Money given to perform a Charitable Uſe, and he waſtes it, and dies inſolvent, the ſurviving Executor ſhall be (*a*) charged therewith; but *ſecus*, if he had not meddled in the Execution, or had not joined in proving the Will. *Duke's Char. Uſes* 66.

(*a*) Though Purchaſers for valuable Conſideration without Notice, are by the expreſs Words of the Statute exempted from having their Purchaſes impeached, yet the Perſons ſelling, and diſpoſing of Lands, Goods, &c. in Breach of their Truſt, and having Notice of the Charitable Uſe, ſhall make Satisfaction; ſo ſhall their Heirs and Executors, as far as they have Aſſets. *Duke's Char. Uſes* 6.

5. If a Rent-charge is granted to a Charitable Uſe out of Lands, in ſeveral Counties, the Commiſſioners are to charge this Rent by their Decree, upon all the Lands in every County, according to an equal Diſtribution, having a Regard to the yearly Value of all the Lands charged, and cannot by their Decree charge one or two Manors with all the Rent, and diſcharge the Reſidue in other Counties and Places, for that would be decreeing contrary to the Intent of the Donors. *Duke's Char. Uſes* 65.

6. The Town of *A.* was, upon a Commiſſion of Charitable Uſes, decreed liable to a Charity, and the Grantees diſtrained for the

whole on One, who held only Part of the Lands chargeable: And it was held that the whole Town being made chargeable, they might ſue for the whole on any Part; but a Commiſſion was awarded to apportion each Man's Share. 1 *Chan. Rep.* 91. *Vide* 1 *Salk.* where it is held, that all the Tertenants of Lands liable to a Charity need not be made Parties to the Suit.

## (E) What ſhall be a Miſ-imployment of a Charity, as by altering it from the Donor's Intentions, not increaſing the Rents as the Price of Things increaſe, &c.

1. IF one, who hath a Leaſe of Lands charged with a Charity, commits Waſte, this is ſuch a Miſ-imployment for which the Commiſſioners may decree the Leaſe void. *Vid. Duke's Char. Uſes* 155.

2. To keep the Profits of Land or Money given to a Charitable Uſe in one's Hands, whether it be concealed or not; not to pay it when it is due, or convert it to other Uſes, is a Miſ-imployment, for which the Commiſſioners may decree Satisfaction. *Duke's Char. Uſes* 116.

3. If Money be given for the Relief of the Poor, and it is paid out to build a *Conduit*, this is a Miſ-imployment: Adjudged 5 *Car.* 1 *Duke's Char. Uſes* 94.

4. Several diſtinct Charities were given to a Pariſh, *viz.* 12 *l. per Ann.* for repairing the Church, 6 *l. per Ann.* for mending the Highways, and ſo much to the Poor; in all 40 *l. per Ann.* And the Truſtees having paid 10 *s.* a Day to a Lecturer, and laid out other Parts of it for the Service of the Pariſh, but not according to the Directions of the Donor: It was held by my Lord *Chancellor*, that if it ſhould be admitted that Pariſhioners might charge and apply Parochial Charities as they thought fit, it would deſtroy all Charities; and therefore ordered, that for what was paid the Parſon they ſhould not be allowed a Farthing; but that for the other Payments they ſhould be allowed the Money; being promiſcuouſly paid for ſeveral Years before; but that for the future, it ſhould be paid according to the Terms of the Charity. *Paſch.* 1682. between *Man* and *Ballet*, 1 *Vern.* 42.

5. A Man having deviſed 50 *l. per Ann.* for a Lecturer in *Polemical* or *Caſuiſtical* Divinity, ſo as he was a Bachelor or Doctor in Divinity, and fifty Years of Age, and would read five Lectures every Term, and would at the end of every Term deliver fair Copies of the ſame to be kept in the Univerſity; and in Default of ſuch Lecturer, he gave that 50 *l. per Ann.* to ——— College in *Oxon*: With the Conſent of the Heir, Application was made to mitigate the Rigour of the Qualifications, *viz.* That a Man aged 40, might be capable; that three Lectures may be ſufficient every Term; and that if fair Copies were delivered once in every Year, it may ſuffice: But my L. *Chancellor* refuſed to intermeddle, though no Oppoſition was made, and ſaid, that it was not in the Power of the Heir to alter the Diſpoſition of his Anceſtor. *Paſch.* 1682. *Attorney General* on the Behalf of *Peter-houſe* College in *Cambridge*, *&c.* 1 *Vern.* 55.

6. If

6. If Truſtees under-let the Land, and make a Leaſe good by Law, yet the Commiſſioners may make this Leaſe void, and order the Settlement of the Land on other Truſtees. *Duke's Char. Uſes* 123.

7. If one give his Land, then worth 10 *l.* a Year, to maintain a Preacher, School-maſter, and poor People in *Deal*, and the Land after comes to be worth 100 *l.* a Year, it muſt be all imployed to increaſe the ſeveral Charities. The School of *Thetford*'s Caſe, 8 *Co.* 130. where Lands were ſet at an under-value, and had been for a long Time ſo enjoyed, the Leaſe was ſet aſide, and the Tenant decreed to pay the Arrears of the Rent according to the full Value. 2 *Vern.* 414.

8. If in the Conſtitutions for founding an Hoſpital, it was ordained that no Leaſe ſhould be made for above Twenty-one Years, and the Rent not to be raiſed, nor above three Years Rent taken for a Fine, though the Tenant of the Hoſpital Lands is intitled to a beneficial Leaſe upon Renewal; yet this Conſtitution is not to be followed according to the Letter; but as Times alter, and the Price of Proviſions increaſes, ſo the Rent ought to be raiſed in Proportion. *Mich.* 1707. *Watſon* and *Hinſworth Hoſpital*, 2 *Vern.* 596. *Vide* 2 *Vern.* 746. *S. P.*

## (F) Concerning Commiſſioners of Charitable Uſes.

1. COmmiſſioners may appoint Truſtees, and enable a certain Number, and their Heirs, to demiſe the Lands, *&c.* for the beſt Advantage of the Charity; or that when ſuch a Number of them die, the Survivors may elect others, and ſo continue the Number appointed. *Duke's Char. Uſes.*

2. If Truſtees to a Charitable Uſe miſ-behave themſelves by making Leaſes at low Fines and ſmall Rents, *&c.* the (*a*) Commiſſioners may decree them void; they may likewiſe turn them out for any Breach of Truſt, and appoint others. *Duke's Char. Uſes* 124.

(*a*) By the Statute of 43 *Eliz.* the Commiſſioners have Power to enquire of Abuſes, of Breaches of Truſt, of Negligence, of Miſ-imployment, of not Imploying, of Concealing, of Defrauding, of Miſ-converting, of Miſ-government, *&c.* See this Statute expounded, 2 *Inſt.* 710.

3. The Commiſſioners are not to enquire of the Miſ-imployment of any Charitable Uſe in another County, than that wherein the Lands given to ſuch Uſe do lie. *Duke's Char. Uſes* 118.

4. If the King erects a Free-School, and gives Lands to it, and appoints four Knights, and the Heir Males of each of their Bodies, to be Governors and Viſitors, and that none others ſhall intermeddle but Knights; by the Saving in the Statute the Commiſſioners are excluded from having any Juriſdiction. *Duke's Char. Uſes* 125.

5. So if Lands be given to a Charitable Uſe, and the Donor appoints Truſtees, and likewiſe Viſitors, to ſee the Truſt performed; in this Caſe the Commiſſioners cannot, by Virtue of the (*a*) Statute, intermeddle. But if the Viſitors are Truſtees alſo, then the Commiſſioners ſhall have Juriſdiction. *Duke's Char. Uſes* 124.

(*a*) The Things excepted in the Statute, and concerning which the Commiſſioners can have no Juriſdiction, are thoſe relating to Colleges and Halls in either of the Univerſities of *Cambridge* and *Oxford*, the Colleges of *Weſtminſter*, *Eaton* and *Wincheſter*, Towns Corporate, where there are ſpecial Governors, Colleges, Hoſpitals, or Free Schools, which have Special Viſitors or Overſeers appointed to them by the Founders; alſo Purchaſers for valuable Conſideration without Notice, *&c.* are protected by the Statute.

# CAP. XV.

# Commiſſions for Examining of Witneſſes.

(A) In what Caſes a Commiſſion will be granted.
(B) Concerning the Commiſſioners, and the Execution and Return of the Commiſſion.

## (A) In what Caſes a Commiſſion will be granted.

1. IF a Man is to perfect his Anſwer upon Interrogatories, or to be examined for a Contempt, although the Rule of Court be, that he ſhall be examined in four Days, or ſtand committed; yet if the Party be in the Country, he ſhall have a Commiſſion to take his Examination. 1 *Vern.* 187.

2. If certain Exhibits of Writings, which were given in at a Commiſſion for Examination of Witneſſes, are altered and interlined ſince the Commiſſion executed, a new Commiſſion will be granted to examine as to this Matter; but not as to the Merits on new In-

terrogatories. *Hill.* 25 *Car.* 2. between *Richardſon* and *Lowther*, 1 *Chan. Ca.* 273. tho' it was objected, that the Party had a Commiſſioner preſent, and that he could not know it, but by the Diſcovery of his Commiſſioner, who ought not to diſcover the Examination.

3. But where a Witneſs alledged, that he had miſtaken himſelf at a Commiſſion, and the Commiſſion being returned, he came to *London*, and made Oath, that he was ſurpriſed; upon which a ſpecial Commiſſion iſſued to re-examine the Witneſſes, which was done accordingly; but this ſpecial Commiſſion was ſuppreſſed by the Maſter of the Rolls, by the Advice of the Six Clerks, as contrary to the (*a*) Courſe of the Court. 1 *Chanc. Ca.* 25.

(*a*) But it is now the Practice of the Court to obtain an Order, on Motion and Affidavit of Surprize, to have the Witneſſes examined *viva voce* in Court, or his Depoſitions amended, the Witneſs being firſt examined before an Examiner; but when he is examined in Court, or when his Diſpoſitions are read, the Order for that Purpoſe muſt be produced in Court.

4. If after Publication, any new Matter ariſes upon Debate, or Hearing the Cauſe, which may be thought material by the Court, a new Commiſſion may be granted. 2 *Chanc. Ca.* 75.

5. A general Affidavit of having material Witneſſes beyond Sea, ſhall not be ſufficient for a new Commiſſion; but the Witneſſes muſt be named in the Affidavit, and the Point mentioned to which they can materially depoſe. 1 *Vern.* 334.

## (B) Concerning the Commiſſioners, and the Execution and Return of the Commiſſion.

1. IF the Commiſſioners misbehave themſelves, the Court may grant an Attachment againſt them; but regularly a Commiſſion cannot be ſuppreſſed, but upon a Reference and Certificate of Irregularity. *Cary* 43.

2. If a Commiſſioner in a Cauſe be himſelf to be examined as a Witneſs, he muſt be firſt examined; and if others be before him examined in his Preſence, he cannot afterwards be examined, having heard the former Examinations; and for that Cauſe a Commiſſioner was examined in Court, his former Depoſitions being ſuppreſſed. 2 *Chanc. Ca.* 79.

3. When a Commiſſion is returnable *ſine dilatione*, if it be within the Kingdom, it muſt be returned by the ſecond Return of next Term; if executed afterwards, it is void, and the Depoſitions ought to be ſuppreſſed. *Per Cur'.* 2 *Vern.* 197.

## CAP. XVI.

# CAP. XVI.

## Common.

### (A) In what Matters relating to a Common will a Court of Equity interpoſe and exert a Power.

1. IF one Commoner, who had recovered 10 *l.* Damages at Law againſt another for oppreſſing the Common, brings a Bill againſt the Defendant at Law, to examine his Witneſſes, and prove his Right of Common *in perpetuam rei memoriam*, ſuch a Bill will not be admitted till ſuch Commoner has recovered at Law in Affirmance of his Right. *Hill.* 1684. between *Pawlet* and *Ingres*, 1 *Vern.* 308.

2. But if the Bill had been, that one Commoner had recovered 1 *s.* or other ſmall Sum for Damages againſt the Plaintiff for Oppreſſing the Common, or for uſing the Common when he ought not, and therefore that the other Commoner may accept of the like Damages for what was paſt, to prevent Charges at Law, that had been in the Nature of a Bill of Peace, and proper in this Court. 1 *Vern.* 308, 309.

3. A Man having granted to *J. S.* Common in his Down for 100 Sheep and five Rams, the Bill complained, that the Grantor overſtocked the Common; ſo that the Plaintiff, the Grantee, could have no Benefit of the Grant, and prayed the Grantor might be injoined not to over-ſtock, *&c.* but upon Debate the Court (*a*) diſmiſſed the Bill. *Mich.* 1689. between *Fines* and *Cob*, 2 *Vern.* 116.

(*a*) For a Commoner may have an Action, if the Lord, or any other Perſon ſurcharges the Common. *F. N. B.* 125. 9 *Co.* 112. *S. P.*

4. If the Lord of a Manor incloſes Part of the Common, and ſuggeſts that it is only an Improvement within the Statute of *Merton*, and the Tenants, by Force, throw open the Incloſures, Chancery will grant an Injunction, and direct an Iſſue to be tried at Law, whether there was ſufficient Common left beyond what was incloſed. Decreed *Hill.* 1697. between *Arthington* and *Fawkes*, 2 *Vern.* 356. 2 *Vern.* 301. *S. P.*

5. There was an Agreement for an Incloſure, but all that claimed Common were not Parties to it; and altho' it was inſiſted upon, that to decree the Agreement would be to do a manifeſt Wrong; yet

yet the Court decreed it, and ſaid, that if any that had Intereſt were not Parties to the Agreement, they could not be bound, and ſo at no Prejudice; but however, that it ſhould not be in the Power of Two or Three wilful Perſons to oppoſe a publick Good. 1 *Chan. Ca.* 48.

6. So where an Agreement was between the Lord and ſome of the Tenants to ſtint a Common, it was decreed, though oppoſed by one or two humourſome Tenants. *Trin.* 1689. between *Delabeere* and *Beddingfield*, 2 *Vern.* 103. and there ſaid, that an Agreement to ſtint was more favoured than an Agreement to incloſe.

7. But in a Caſe where it was not charged in the Bill, that the Defendant would be benefited by the Incloſure, nor charged that there was any Agreement for an Incloſure; on a Demurrer, for theſe Reaſons, the Bill to compel the only Freeholder in the Manor to conſent to an Incloſure, was diſmiſs'd. 1 *Chanc. Rep.* 259.

8. A Common which has been incloſed for thirty Years, ſhall not afterwards be thrown open. *Hill.* 1681. between *Silway* and *Compton*, 1 *Vern.* 32.

9. So where there was a Decree for an Incloſure twenty Years ſince, to which the Husband agreed; but the Wife having an Eſtate within the Manor, and her Husband's Agreement not in Strictneſs binding her, ſhe would now diſturb the Incloſure; but it being proved that ſhe was benefited by the Incloſure, the Court decreed that it ſhould ſtand. *Paſch.* 1687. between *Rothwell* and *Widdrington*, 1 *Vern.* 456.

10. If the Lord of the Manor enfranchiſes a Copyhold, with all Commons thereunto belonging or appertaining, and afterwards buys in all the other Copyholds, and then diſputes the Right of Common with the Copyholders he had enfranchiſed, and recovers at Law; tho' the Common be (*b*) extinct at Law, yet it ſhall ſubſiſt in Equity, and the ſame Right of Common as belonged to the Copyhold will be decreed. *Hill.* 1691. between *Styant* and *Stuker*, 2 *Vern.* 250.

(*b*) Where the Lord's Enfranchiſing a Copyhold, with all Common thereunto belonging, is an Extinguiſhment at Law. *Vid.* 2 *Cro.* 253. *Yelv.* 189. *Moor* 667. 1 *Brownl.* 173, 230. and where a Releaſe of Common in one Acre is an Extinguiſhment of the whole Common, or where the Unity of Poſſeſſion of the whole Land makes an Extinguiſhment, *vide* 4 *Rep.* 37. 1 *Inſt.* 122. 8 *Rep.* 136.

CAP.

# CAP. XVII.

# Conditions and Limitations.

(A) Who are to take Advantage of a Condition, or will be prejudiced by it.

(B) In what Cases the Breach of a Condition, or the Non-performing of a Condition precedent or subsequent, will be relieved against, the Matter resting in Compensation.

(C) In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding or void, being only in Terrorem.

## (A) Who are to take Advantage of a Condition, or will be prejudiced by it.

1. IF by a Settlement Lands are limited to the second Son in Fee, provided that if the eldest Son die without Issue, the second Son shall within six Months after the Death of the eldest Son, pay 1500*l.* to a Sister; or in Default thereof the Land to go to the Sister and her Heirs; and the eldest Son dies without Issue, and the Sister dies within the six Months; upon the second Son's refusing to pay the Money, the Land shall go to the Heir, and not to the Executor of the Sister; for to decree otherwise, would be to destroy the known (*a*) Difference between a Condition and a Limitation. Decreed, with the Assistance of the two Chief Justices, *Trin.* 1686. between the Earl of *Winchelsea* and *Wentworth*, 1 *Vern.* 402, 430. *S. C.*

(*a*) Words which create a Condition are, *upon Condition, so that, to the Intent, to pay, to the Effect*, &c. *Co. Lit.* 204. *Hard.* 10, 11. but as to Words which make a Condition in a Will, tho' not in a Deed, *vide* 10 *Co.* 40, 41. And there it is held, that if there be express Words of Condition annexed to the Estate, it cannot be construed a Limitation, as the Words, *Quamdiu, dummodo, dum, quousque, durante*, &c. But this Opinion is now exploded; for tho' Words which properly create a Condition be used; yet if the Estate be limited over, it shall be a Limitation. 2 *Brownl.* 65, 66. 1 *Roll. Abr.* 412. 1 *Mod.* 86. And *per Hale* Ch. Baron, There is no other Case to warrant the contrary Opinion, but that of 10 *Co.* 40, and by him it may properly be called a conditional Limitation, 1 *Vent.* 199. of which the Heir cannot take Advantage, though it may determine the Party's Estate without Entry or Claim, which seems to be the chief Difference between a Condition and Limitation. Also if Lands are devised to the Heir at Law, upon Condition that he pay a Sum of Money, or do any other Act; this, on Failure of Performance, shall be construed a Limitation, tho' not mentioned; for if it were a Condition, no Body could take Advantage of it, the Benefit of Conditions annexed to the Real Estates belonging to the Heir, as those to the Personal do to the Executor. *Cro. Eliz.* 204. 3 *Co.* 22. *Owen* 112. 2 *Mod.* 7. 1 *Lut.* 809.

2. A Man ſeiſed in Fee deviſed Lands to his Daughter and her Heirs, and his Mind is, That if his Son pay to her 50 *l.* then his Son ſhall have the Land; the Money was not paid at the Day; the Daughter ſold the Land; and it was decreed againſt the Vendee, the Son paying the Money, for the Court took it to be but in Nature of a Security. *Hill.* 30 *Car.* 2. between *Bland* and *Middleton*, 2 *Chan. Ca.* 1. But the Reporter being of Opinion, that the Son took but an Eſtate for Life, adds a *Quære*, why a Fee-ſimple ſhould be (as it was) decreed him, ſeeing thereby he had more Benefit by the not Performing the Condition, than if he had performed it.

3. A Man deviſed Lands called *S.* to his younger Son, and declared, that if he ſhould anyWay be hindered from enjoying them, then in Lieu thereof, he ſhould have all the Land at *B.* A Moiety of the Lands called *S.* were evicted from the Deviſee, who thereupon inſiſted to have the whole Lands at *B.* but the Court decreed that he ſhould have as much of the Lands only at *B.* as were equal in Value to thoſe evicted. *Mich.* 1684. between *Tyle* and *Tyle*, 1 *Vern.* 270.

4. If Legacies are given by Will to four Grandchildren, upon Condition, that as they come of Age, they ſhall releaſe all Claims to the Teſtator's Eſtate, this Condition muſt be taken *diſtributively*, and ſuch only as refuſe to releaſe ſhall forfeit their Legacies. *Per* L. K. 2 *Vern.* 478.

5. A Man having Iſſue a Son by the firſt Venter, and two Sons and ſix Daughters by a ſecond Wife, ſettles his Eſtate in Queſtion on his eldeſt Son by his ſecond Wife in Tail Male, Remainder to his ſecond Son by his ſecond Wife, and the Heirs Males of his Body; and in Default of ſuch Iſſue, to the Son by the firſt Wife; provided, if both his Sons by the ſecond Wife died, without Iſſue Male, ſo that the Eſtate came to the eldeſt Son; that then his eldeſt Son, or his Heirs ſhould, within four Months after the Eſtate came to him, or them, pay 1000 *l.* to his Daughters; or in Default, the Truſtees therein named, to enter and raiſe it: The Son by the ſecond Wife entred, and ſuffered a Recovery of one Moiety of the Lands, and died without Iſſue, and the other Son by the ſecond Wife died alſo, by which one Moiety of the Land came to the Heir of the eldeſt Son by the firſt Wife; and the Moiety thus deſcended was decreed liable to the whole Sum of 1000 *l.* although it was objected that the Eſtate never came to the eldeſt Son; and tho' a Moiety came to his Heirs, yet as ſo great a Benefit did not accrue to him as was intended, he ſhould be only anſwerable in Proportion. *Mich.* 1698. between *Hooley* and *Booth*, 2 *Vern.* 359.

6. *J. S.* having Iſſue three Sons, *William* his eldeſt, *Nathaniel* his ſecond, and *Daniel* his third; *William* died in the Life-time of his Father, leaving Iſſue only a Daughter; afterwards the Father deviſes the Eſtate in Queſtion to *Anne* his Wife for her Life, and after her Death to his Son *Daniel* and his Heirs; provided that if *Nathaniel* do, within three Months after the Death of my Wife, pay to *Daniel*, his Executors or Adminiſtrators, the Sum of 500 *l.* then the ſaid Lands ſhall come to my Son *Nathaniel*, and his Heirs; the Wife lived ſeveral Years after, and during her Life, *Nathaniel* died, leaving the Plaintiff his Heir, and the Wife afterwards dying, the Plaintiff brought this Bill within three Months after her Death, praying, that upon Payment of the 500 *l.* he might have a Conveyance of the Eſtate; and the principal Point in the Caſe was, whether this 500 *l.*

being to be paid by *Nathaniel* within a limited Time, and he dying before that Time came, whether his Heir at Law could now, on Payment of the Money, make a Title to theſe Lands; for it was agreed that he was not Heir at Law to the Teſtator; and it was inſiſted upon, that he could not; that this was a Condition precedent, and meerly perſonal in *Nathaniel*, who had neither *Jus in re*, nor *ad rem*, and could neither have deviſed or releaſed, or extinguiſhed this Condition; and being a bare Poſſibility, and he dying before it was performed, his Heir could not make it good; and tho' the Word *Heirs* be uſed in the Deviſe to *Nathaniel*, yet that is not deſigned to give them any Eſtate originally, but to denote the Quantity of the Eſtate which *Nathaniel* was to take; and for this were cited *Lampet*'s Caſe, 10 *Co.* and *Bret* and *Rigden*'s, *Plow. Com.* On the other Side it was inſiſted, that this was like the common Caſe, *Co. Lit.* 205, 219. *b.* where a Feoffment is made, on Condition that the Feoffor ſhall, before ſuch a Day, *&c.* there if the Feoffor die before the Day, his Heir may perform the Condition, for the Reaſons there mentioned; and that it being ſo at Law, it ſhould ſtill be conſtrued more liberally in Equity, where the Letter of a Condition is not always required to be ſtrictly performed; and for this was cited 1 *Chan. Ca.* 89. *Bertie* and *Falkland*, 3 *Chan. Ca.* That the Poſſibility of performing this Condition was an Intereſt or Right, or *Scintilla Juris*, which veſted in *Nathaniel* himſelf; that he ſurvived the Teſtator; and therefore this differed from *Brett* and *Rigden*'s Caſe, *Plow. Co.* 110. that conſequently ſuch Right, Poſſibility or Intereſt, deſcended to his Heir, and might be performed by him; as before the Statute *de donis*, the Poſſibility of Reverter deſcended to the Heir of the Donor; and for this were cited *Purfoy* verſus *Rogers*, 2 *Saund.* *Cro. Car.* 358. *Cro. Jac.* 591. 8 *Co. Matthew Manning*'s Caſe, and others. TheCauſe being firſt heard by the Maſter of the *Rolls*, was thought by him a Matter of great Difficulty, and therefore he appointed the Counſel to ſpeak to it when the Court was full. Afterwards it was decreed by my Lord Chancellor, with the Aſſiſtance of the Maſter of the Rolls, for the Plaintiff, on *Litt. Sect.* 334, 335. And my Lord Chancellor ſaid, that tho' a Condition, in Strictneſs of Law was not deviſable, yet ſince the Statute of Uſes, the Deviſee may take Benefit of it by an equitable Conſtruction, *&c.* and that *Nathaniel* might have releaſed or extinguiſhed this Condition. *Mich.* 5 *Geo.* between *Marks* and *Marks*.

## (B) In what Caſes the Breach of a Condition, or the not Performing a Condition precedent or ſubſequent, will be relieved againſt, the Matter reſting in Compenſation.

1. IF *A.* conveys Lands to *B. &c.* and their Heirs, upon Truſt, that if *C.* the Son of *A.* within ſix Months after the Death of *A.* ſhould ſecure to Truſtees 500 *l.* for the younger Children of *C.* then after ſuch Security given, to convey to *C.* and his Heirs, and until the Time for giving ſuch Security, in Truſt for the eldeſt Son of *C.* and in Default of ſuch Security to convey to ſuch eldeſt Son and his Heirs, if *C.* dies before any ſuch Security given; yet this Condition

Condition (*a*) precedent being only in Nature of a Penalty, the Intent of the Truſt ſhall be regarded, which was to ſecure 500 *l.* to the younger Children. *Trin.* 19 *Car.* 2. between *Wallis* and *Crimes*, 1 *Chan. Ca.* 89. 1 *Mod.* 307. *S. C.* cited.

(*a*) Conditions precedent are ſuch as are annexed to Eſtates, and muſt at Law be punctually performed before the Eſtate can veſt. A Condition ſubſequent is when the Eſtate is executed; but the Continuance of ſuch Eſtate dependeth on the Breach or Performance of the Condition; though this Diſtinction is often mentioned in Courts of Equity, yet the prevailing Diſtinction is to relieve againſt Conditions, where Compenſation can be made, whether they be precedent or ſubſequent, as appears by this and ſeveral other Caſes.

2. The Teſtator deviſed his Eſtate to the Defendants in Truſt, for the Uſe and Benefit of the Plaintiff, but declared his Will to be, that the Plaintiff ſhould have no Benefit of the Deviſe, unleſs the Plaintiff's Father ſhould ſettle on the Plaintiff two full Thirds of the Eſtate ſettled on the Father on his Marriage; and in Default thereof the Eſtate to the Defendants; the Father made no Settlement on the Plaintiff, but deviſed all his Eſtate to him for Life, but ſubject to the Payment of Debts; it was admitted, and ſo adjudged by the Court, that this Eſtate was executed in the Plaintiff by the Statute of Uſes, and conſequently that this is a Condition ſubſequent; yet the Court declared, that though Conditions ſubſequent, which are to deveſt an Eſtate, need not be literally performed; yet even in ſuch Caſe, if the Party cannot be compenſated in Damages, it would be againſt Conſcience to relieve, and therefore ordered the Maſter to examine the Value of the Eſtate deviſed, and the Amount of the Debts which that Eſtate was charged with, and to report to the Court, whether after Debts paid, there would be two full Thirds of the Father's Eſtate, which was ſettled on him in Marriage, left to the Plaintiff; and upon a Rehearing would not vary the former Order; declaring that the Difference was, whether this Caſe lay in Compenſation, or not; and if a Compenſation was made, he would relieve againſt the Breach of the Condition; but in Caſe a ſufficient Compenſation was not made, he would then conſider farther of it. *Paſch.* 1683. between *Popham* and *Bampfield*, 1 *Vern.* 79, 167. *S. C.* 2 *Vern.* 222. *S. C.* cited as a Caſe in which there was Relief. 2 *Vern.* 338. *S. C. cited* as a Condition which was relieved againſt.

3. If a Feme Covert, having Power by Will to deviſe Lands, deviſes them to her Executors to pay 500*l.* out of them to her Son; provided that if the Father gives not a ſufficient Releaſe of certain Goods to her Executors, that then the Deviſe of the 500*l.* ſhould be void, and go to the Executors; and after her Death a Releaſe is tendred to the Father, and he refuſes; yet upon making the Releaſe afterwards, the Money ſhall be paid to the Son; for it was ſaid to be the ſtanding Rule of the Court, that a Forfeiture ſhould not bind where a Thing may be done after, or a Compenſation made for it, as where the Condition is to pay Money, *&c.* and though it is generally binding where there is a Deviſe over; yet here it being to go to the Executors, it is no more than the Law implies. Between *Cage* and *Ruſſel*, 2 *Vent.* 352.

4. If a Man deviſes Lands to *J. S.* upon Condition to pay 20000*l.* to his Heir at Law, *viz.* 1000*l. per Ann.* for the Firſt ſixteen Years, and 2000*l. per Ann.* after, till the Whole ſhould be paid, and the Heir enters for the Non-payment of one of the 1000*l. per Ann. J. S.* ſhall be relieved upon Payment of the 1000*l.* together with Intereſt

from the Time it became payable, without any Deduction for Taxes, the Court declaring, that where-ever they can give Satisfaction or Compenſation for the Breach of a Condition, they can relieve. *Mich.* 6 *Ann.* between *Grunſton* and Lord *Bruce*, 1 *Salk.* 156. 2 *Vern.* 594. *S. C.*

5. If one having three Daughters, deviſes Lands to his Eldeſt, upon Condition, that ſhe, within ſix Months after his Death, pay certain Sums to her two other Siſters; and if ſhe failed, then he deviſed the Land to his ſecond Daughter on the like Condition, *&c.* the Court may inlarge the Time for Payment, though the Premiſſes are deviſed over; and in all Caſes that lie in Compenſation, the Court may diſpenſe with the Time, though even in Caſe of a Condition precedent. *Paſch.* 1691. between *Woodman* and *Blake*, 2 *Vern.* 222. *Note*; the following Caſe, which ſeems to be between the ſame Parties, is otherwiſe ſtated.

6. One ſeiſed in Fee of Lands of 10000*l.* Value, ſettles it ſo, that in Caſe his eldeſt Daughter, within ſix Months after his Death, ſhould pay 6000*l.* to the Uſe of his other four Daughters, then the Eldeſt to have the Land; but if ſhe failed in Payment, then the ſecond to have the like Privilege; the ſix Months paſt without Payment; and the eldeſt Daughter having aſſigned over her Intereſt to one to whom ſhe was indebted, by which the Eſtate was to go out of the Family, contrary to the Intention of the Donor; the Court took Time to conſider, whether they could retrieve in this Caſe, or not. Between *Woodman* and *Blake*, 2 *Vern.* 166.

7. If the Father makes a voluntary Settlement on his eldeſt Son in Tail Male, Remainder to a ſecond Son, *&c.* in which is a Proviſo, that if the Eldeſt did not pay the Second 600*l.* at his Age of twenty-one Years, that then the Eſtate of the Eldeſt ſhould, in Law and Equity, ceaſe; and the Father afterwards marries a ſecond Wife, and by Deed, taking Notice of the former Settlement, and that the Son had not paid the Money, conveys the ſame Lands to the Uſe of his Children by his laſt Wife; the eldeſt Son ſhall not be relieved, the Conveyance being partly voluntary, and the Condition ſpecial, that his Eſtate ſhould ceaſe in Law and Equity. *Paſch.* 1687. between *Longdale* and *Longdale*, 1 *Vern.* 456. and the Son's Bill diſmiſſed accordingly; and the rather, for that the Son had ſet up a Leaſe againſt his Father, which was obtained by Surprize; and the Deed in Law was defective, and amounted only to a Declaration of Truſt.

8. But where one deviſed his Lands to his Kinſman, paying a Thouſand Pounds a-piece to his two Daughters, who were his Heirs at Law, and *J. S.* made Default, and the Daughters recovered in Ejectment; yet *J. S.* was relieved on Payment of Principal, Intereſt and Coſts; tho' it was inſiſted, that this was to the Diſinheriſon of the Heir, and in Favour of a voluntary Deviſee. *Mich.* 1699. between *Barnardiſton* and *Fane*, 2 *Vern.* 366.

9. A Man deviſed to each of his Daughters 20000*l.* payable at the Age of Twenty-five Years; but if they, or either of them, married before the Age of Sixteen, or if the Marriage were without the Conſent of their Mother and Truſtees, then they ſhould loſe 10000*l.* of the Portion, which ſhould go to his other Children; one of them married before the Age of Sixteen, and tho' it was with the Conſent of all the Parties, yet my Lord *Keeper* held, that both the Terms of

the Condition ought to have been obſerved. *L. Salisbury*'s Caſe, 2 *Vent.* 365. but *Vid.* 2 *Vern.* 223. *S. C.* Reported, where it is ſaid, that the Father treated with the Lord *Salisbury* about the Marriage, though he died before it was had; and there the Decree is quite contrary: And with this laſt Reſolution agrees *Skin. Rep.* 285. *S. C.*

10. *A.* deviſed his Lands to Truſtees for three Years, and if within the three Years there happened a Marriage between *G.* who was a diſtant Relation, and of the ſame Blood, and *W.* his Niece and Heir at Law, then to *W.* for Life, Remainder to her firſt Son, *&c.* in Tail Male by *G.* to be begotten: But if the Marriage ſhould not take Effect within the three Years, or if the Marriage ſhould be before the Years of Conſent, and not ratified when of competent Age, then to *F.* in Tail, who was likewiſe a remote Relation of the Teſtator, but not of the ſame Blood. The Marriage between *G.* and *W.* did not take Effect within the three Years, though ſeveral Propoſals were within the Time made by her Friends to his Guardians, but not accepted by them; and though ſhe herſelf had preſſed the Match as far as the Modeſty of her Sex would permit. She afterwards married the Plaintiff, and by her Bill, prayed the Benefit of the Deviſe, the Condition being anſwered by her to what ſhe was capable of doing, having married a Perſon, as was urged, equal in Circumſtances, *&c.* to *G.* but her Bill was diſmiſſed, by the Advice of *Holt* and *Treby*, Ch. *Juſtices*, *Hill.* 9 *W.* 3. between *Bertie* and Lord *Faulkland*, 3 *Chan. Ca.* 129. 1 *Salk.* 231. *S. C.* where it is ſaid that the Decree was reverſed in the Houſe of Lords. 2 *Vern.* 333. *S. C.* where it is ſaid, that the Matter was ended there by Compromiſe.

## (C) In what Caſes a Gift or Deviſe, upon Condition not to Marry without Conſent, ſhall be good and binding, or void, being only in Terrorem.

1. IF there be a Portion of 8000 *l.* given to a Woman, provided ſhe marries not without the Conſent of *A.* and that, if ſhe marries without his Conſent, ſhe ſhall have but 100 *l. per Ann.* yet if ſhe marries without his Conſent, ſhe ſhall be relieved, for the Proviſo is *in Terrorem* only. *Trin.* 15 *Car.* 2. between Sir *Hen. Bellaſis* and his Wife, and Sir *Will. Ermin*, 1 *Chan. Ca.* 22. 2 *Chan. Rep.* 23. *S. P.* 1 *Vern.* 20. *S. P. per* L. *Chancellor*, *Nel. Chan. Rep.* 145. *S. P.* decreed, 2 *Vern.* 293. *S. P.*

2. But it was ſaid, that if the Portion upon ſuch Marriage had been limited over to another, it had been (*a*) otherwiſe. 1 *Chan. Ca.* 22. 2 *Chan. Rep.* 95. *S. P.* decreed; 2 *Vern.* 357. *S. P.* decreed, and the Diſtinction taken *ut ſupra.*

(*a*) A Deviſe upon Condition not to marry at all, or not to marry a Perſon of ſuch a Profeſſion or Calling, is void by our Law, whether there be a Limitation over or not; but if it were upon Condition not to marry a Papiſt, or a certain Perſon by Name, it may be good. 1 *Vern.* 20. But by the Civil Law, a Gift or Deviſe upon Condition not to marry without Conſent is void, though there be a Limitation over; for the Maxim there is *Matrimonium eſſe Liberum*; per *Hale C. J.*

3. If by Leaſe 9000 *l.* is ſecured for a Feme Sole, in Caſe ſhe marries not contrary to the Liking of *A.* and if ſhe doth, then for ſuch Perſon as *A.* ſhall nominate; and for Want of ſuch Nomination, for *A.* and ſhe marries without the Conſent of *A.* yet he can-

not diſpoſe of the Leaſe otherwiſe than for her Benefit. *Mich.* 16. *Car.* 2. between *Fleming* and *Waldgrave*, 1 *Chan. Ca.* 58. 2 *Vern.* 573. *S. C.* cited, where it is ſaid, that there may be a Difference between a Condition that ſhe ſhall not marry without Conſent, and where it is that ſhe ſhall not marry againſt Conſent.

4. If *A.* deviſes a Meſſuage, *&c.* to *B.* his Wife for Life, Remainder to *C.* his Grand-Daughter in Tail, upon Condition that *C.* marries with the Conſent of his Wife, and *D.* and *E.* or the major Part of them; and if ſhe marries without their Conſent, or dies without Iſſue, deviſes the ſame to *F.* and her Heirs; and after *C.* ſteals away, and is married without the Conſent of any of them; and all of them, as ſoon as they heard of it, proteſt againſt the Marriage, but afterwards conſent to it; and then *B.* dies, and *D.* and *E.* ſwear that they do not know but that if their Conſents had been asked before, there might have been ſuch Reaſons given that they might have aſſented; yet *C.* ſhall not be relieved in Equity, for the ſubſequent Aſſent cannot deveſt the Eſtate which was before veſted in *F.* And there ſhall be no collateral Averment, that it was intended only *in Terrorem.* Between *Fry* and *Porter*, 1 *Chan. Ca.* 138. Upon the firſt Hearing, a decretal Order was made by the Maſter of the *Rolls*, that ſhe ſhould be relieved, but upon a Re-hearing by the L. *Keeper*, aſſiſted by the three *Chiefs*, her Bill was by their unanimous Opinion diſmiſſed. 1 *Mod.* 300. *S. C.* 2 *Chan. Rep.* 26. *S. C.*

5. *A.* by Will gives his Grand-Daughter 200 *l.* on Condition ſhe continued with his Executors till ſhe was Twenty-one; but if ſhe was taken from them by her Father, (who was a Papiſt) or married againſt the Conſent of his Executors, then he gave her but 10 *l.* The Daughter was placed by the Executors with a Clergyman, who, before ſhe was Twenty-one, with Conſent of one of the Executors, permitted her to make a Viſit to her Father; and he took that Opportunity to marry her to a Papiſt, and ſhe was decreed the Legacy at the Rolls; but upon a Re-hearing, the L. *Keeper* held that ſhe ſhould have but the 10 *l.* only: And he ſaid, that in this Caſe there was no Difference between a Condition that ſhe ſhall not marry without Conſent, and that ſhe ſhall not marry againſt Conſent. *Hill.* 1706. between *Creagh* and *Wilſon*, 2 *Vern.* 572. *Quære, Whether there was any Limitation over?*

6. Lands were ſettled in Truſt for raiſing Portions for Daughters, payable upon their Marriages, with the Conſent of Truſtees; but if they married without ſuch Conſent, then to remain over to another, *&c.* The Daughters were old, and never intended to marry, but to lay out their Portions in a Purchaſe of Annuities for their Lives; and it was held that they ſhould have their Portions immediately, upon giving Security to indempnify againſt the Perſons to whom the Portions were deviſed over. Decreed 25 *Car.* 2. between *Needham* and *Vernon*, *Nel. Chan. Rep.* 62. 2 *Vern.* 452. *S. P.* decreed upon giving Security to refund, if the Condition ſhould be broken, though no Mention made that the Daughters did not intend to marry.

7. *A.* deviſed 300 *l.* to *B.* her Daughter, and that if ſhe married under Twenty-one, without Conſent of the Executors or major Part of them, the Legacy to go to the Children of her Siſter, the Wife of *C.* and made *C.* and two others Executors; *B.* being at the Houſe of *C.* there marries his Son by a former Wife with his Privity, being under Twenty-one; *B.* and her Husband bring a Bill for the Legacy;

*C.* in

*C.* in Favour of his other Children, inſiſts that the Legacy is forfeited. The other Executors confeſſed they had Notice of the Courtſhip, and did not contradict or diſapprove of it; and the 300 *l.* was decreed the Plaintiffs, there being at leaſt a tacit Conſent. *Hill.* 1706. between *Meſgrett* and *Meſgrett*, 2 *Vern.* 580.

8. If the Father deviſes Lands in Truſt to permit his Daughter to receive the Rents until her Marriage, or Death, and in Caſe ſhe marry with the Conſent of Truſtees, then to convey the Premiſſes to her and her Heirs; but if ſhe died before Marriage, or married without ſuch Conſent, then to convey to other Perſons. The Daughter afterwards marries with the Conſent of her Father, who ſettles Part of the Lands on her and her Husband, and dies, this Settlement ſhall be no Revocation of the Will as to the Deviſe of the other Lands to her; and by the Father's conſenting in his Life-time, the Condition is diſpenſed with. *Mich.* 1716. between *Clerk* and *Berkeley*, 2 *Vern.* 720.

9. *A.* deviſed to his Daughter *M.* the Plaintiff, 100 *l.* to be paid by his Executors upon her Day of Marriage, or Age of Twenty-five Years, which ſhould firſt happen, upon Condition that ſhe ſhould marry with the Conſent of ſuch and ſuch Perſons; and if ſhe married without their Conſent, then to have 50 *l.* only, and no more; and gave the Reſidue of his perſonal Eſtate to the Defendants. *M.* married the Plaintiff, without ſuch Conſent, before ſhe was Twenty-one: And it was held by the Maſter of the *Rolls*, that this was more than a Clauſe *in Terrorem*, and that the Deviſe of the Surplus of the perſonal Eſtate, was a Deviſe over of the 50 *l.* on *M.*'s Diſobedience. *Mich.* 1699. between *Amos* and *Horner*.

10. The Defendant's Father deviſed to him, who was his Heir at Law, all his Lands, *&c.* (except ſuch and ſuch Parts) charged with the Sum of 2500 *l.* to his Daughter (ſince married to the Plaintiff) at her Age of Twenty-one Years, or Marriage, which ſhould firſt happen, and deviſed the excepted Lands in Truſt to be ſold for the Payment of his Debts: Provided that if his ſaid Daughter ſhould marry in the Life-time of her Mother without her Conſent firſt had in Writing, then 500 *l.* Part of the ſaid 2500 *l.* ſhould ceaſe, and ſhould be applied towards Payment of his Debts charged on the ſaid excepted Lands; and appoints his Wife to be Guardian of his ſaid Daughter, and makes her Executrix, and dies: The Daughter attains her Age of Twenty-one Years, and without the Conſent or Privity of her Mother inter-marries with the Plaintiff, who was a Gentleman of ſome Eſtate, and called to the Bar, but had made no Settlement or Proviſion for his Wife; and therefore the Defendant, the Heir at Law, refuſed to raiſe or pay any Part of his Siſter's Portion; and inſiſts likewiſe, that by her Marriage without her Mother's Conſent, 500 *l.* Part of her Fortune, was become forfeited: Whereupon the Plaintiffs brought their Bill to have the whole Portion raiſed by Sale of the Lands charged therewith. *Per* L. *Keeper*: This is a Portion to be raiſed out of Lands, and therefore to be conſidered as Land; and though it be to go towards Payment of Debts on Breach of the Condition, and there appear One hundred and twenty Creditors concerned, yet none that are in Danger of loſing their Debts; and it is then to be conſidered as it ſtands upon the Condition itſelf; and therefore the Plaintiff muſt have her whole Portion; for the Teſtator has appointed two Periods of Time to intitle her to it, *viz.*

Marriage, or the Age of Twenty-one: And as ſhe has attained that Age, it becomes a veſted and ſettled Intereſt in her not to be deveſted by the Marriage without the Conſent of the Mother; for that Conſent cannot in any Reaſon be carried farther than during her Minority. *Hill.* 1712. between *King* and *Withers*.

# CAP. XVIII.

# Contribution and Average.

(A) **Contribution and Average in what Caſes.**
(B) **In what Propoztion.**

## (A) Contribution and Average in what Caſes.

1. IF a Man grants a Rent-charge out of all his Lands, and afterwards ſelleth them by Parcels to divers Perſons, and the Grantee of the Rent-charge will from Time to Time levy the whole Rent upon one of the Purchaſers only, he ſhall be caſed in Equity by a Contribution from the Reſt of the Purchaſers. *Cary* 3.

2. One Executor, who pays Debts and Legacies, may compel the other to contribute. *Toth.* 89.

3. If the Collector of Fifteenths levies all the Tax within one Town-ſhip, upon one Inhabitant, he ſhall have the Aid of the Court of Exchequer to make the others contributary. *Lane* 65.

4. If Tenant in Fee mortgages his Eſtate, or charges it with a Sum of Money, and after deviſes it to one for Life, Remainder to another in Fee, Equity will compel the Tenant for Life to bear his Proportion of the Mortgage or Charge, that all may not fall on the Remainder Man: Decreed *Hill.* 25 *Car.* between *Hays* and *Hays*, 1 *Chan. Ca.* 223.

5. So if it be a Rent-charge, Equity will make the Tenant for Life pay the Arrears. 1 *Chan. Ca.* 223. *per Curiam.*

6. *A.* on his Marriage agrees to ſettle Lands for the Benefit of his Wife and their Iſſue, and afterwards aliens Part of thoſe Lands; and my L. *Nottingham* decreed that the Jointreſs ſhould have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unſold: But that Decree was reverſed by *Jefferies*, L. C. who held, that where the Jointreſs and Iſſue claim by the ſame Settlement, they ſhall contribute proportionably in the Diſcharge of any prior Incumbrance on the Eſtate. *Hill.* 1686. between *Carpenter* and *Carpenter*, 1 *Vern.* 440.

7. If *A.* deviſes his real Eſtate to his Son for Life, Remainder to his firſt Son, *&c.* in Tail, with Remainders over, and deviſes ſpecifically a Leaſehold Eſtate to his Daughter, and dies, not leaving Aſſets to pay Debts, which affected as well his real as perſonal Eſtate, the Son and Daughter ſhall contribute in Proportion in paying the Debts, each Eſtate being liable at Law, and the Teſtator's Intention equal between them both: Decreed *Hill.* 1717. between *Short* and *Long*, 2 *Vern.* 756.

8. If a Man, who is a Widower, ſettles Lands to raiſe 100 *l.* a Year for his eldeſt Son, and 100 *l.* apiece for his younger Children; and afterwards he marries again, and has Children by his ſecond Wife; the Children by the ſecond Wife ſhall be equally intitled with the other younger Children; and though the Portions of the younger Children are by the Settlement to be paid according to their Seniority; yet in Caſe of a Deficiency, they ſhall be paid in Average: Decreed *Mich.* 1 *Jac.* 2. between *Brathwait* and *Brathwait*, 1 *Vern.* 334.

9. One Surety may compel another in Equity to contribute towards Payment of a Debt for which they were jointly bound. *Toth.* 41. 1 *Chan. Rep.* 34. *S. P.*

10. If three are bound as Sureties in Recognizance, and one of the Sureties is ſued at Law, and the other Surety, together with the Principal, happens to be inſolvent, he who is ſued may compel the other Surety to contribute a Moiety. 1 *Chan. Ca.* 246. 1 *Chan. Rep.* 120. *S. P.* 1 *Chan. Rep.* 150. *S. P.*

11. If you ſue in Chancery the Executor of one Obligor to diſcover Aſſets, you muſt make all the Obligors (*a*) Parties, that the Charge may be equal. 2 *Vent.* 348. but a *Quære* is put, Whether you may not ſue the Principal, and leave out them which are bound only as Sureties.

(*a*) Though Co-obligors are intitled to a Contribution, yet *Quære*, whether it is neceſſary for the Obligee to make them all Parties.

12. But it is held clearly, that if a Judgment be had at Law againſt one Obligor, you may ſue the Executor of him alone to diſcover Aſſets, becauſe the Bond is drowned in the Judgment. 2 *Vent.* 348.

13. The Plaintiff being one of the Owners of a Ship, loaded on Board her 210 Tuns of Oil, and the Defendant loaded on Board her 80 Bales of Silk, upon a Freight, by Contract, both to be delivered at *London*; the Ship was purſued by Enemies, and forced into an Harbour, *&c.* and the Maſter ordered the Silk on Shore, being the moſt valuable Commodity (tho' they lay under the Oils, and took up a great deal of Time to get at them. (The Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill to have

Contribution from the Owner of the Silk; and although it was admitted that, if Goods were thrown over-board in Streſs of Weather, or in Danger or juſt fear of Enemies, in Order to ſave the Ship and the reſt of the Cargo, that which is ſaved ſhall contribute to a Reparation of that which is loſt; and the Owners of the Ship ſhall be Contributors in Proportion; but in this Caſe the Loſs of the Oils did not ſave the Silks, neither did the ſaving the Silks loſe the Oils: And the Bill was diſmiſſed accordingly; which Diſmiſſion was confirmed in the Houſe of Lords. *Show. P. C.* 18, 19.

14. If one makes a Leaſe, and the Leſſee covenants to pay the Rent, and to repair the Premiſſes, *&c.* and the Leſſee makes 100 Under-Leſſees, and the Rent is behind, and the Premiſſes out of Repair, and the original Leaſe is avoided for Non-payment of Rent; and ſome of the Under-Leſſees bring a Bill to be relieved againſt the Forfeiture; though Equity will not apportion the head Landlord's Rent; but the Under-Leſſees, who are Plaintiffs, muſt pay the whole Rent in Arrear, and repair all the Houſes; yet they may compel the other Under-Leſſees to contribute in Proportion. *Trin.* 1689. between *Webber* and *Smith*, 2 *Vern.* 103.

15. A Man deviſed a Rent-charge of 10 *l. per Ann.* to *A.* iſſuable out of *Black* Acre, with a Clauſe, that if it ſhould be behind, it ſhould be lawful for him to enter, and hold 'till he was ſatisfied; and by the ſame Will deviſed a like Rent-charge of 10 *l. per Ann.* to *B.* iſſuable out of the ſame Land, with like Clauſe of Entry, *&c.* the Land was not of ſufficient Value to anſwer both the Rents; and they were both in Arrear, and both Deviſees had brought ſeveral Ejectments, and had recovered; and the Defendant being in Poſſeſſion, the other Grantee brought his Bill to have an Account of the Profits, and that one Moiety might be applied to ſatisfy the Arrears of his 10 *l. per Ann.* and it was decreed accordingly. *Hill.* 1697. between *Eure* and *Eure.*

16. On a Marriage Treaty between the Defendants, 3000 *l.* being the Wife's Fortune, and 3000 *l.* more added to it by *William Chambers*, Father of the Defendant *John*, were inveſted in Lottery Annuities in the Name of Truſtees; and thereupon by Indenture, 18 *July* 1718. previous to the Marriage, reciting that 6000 *l.* was ſo inveſted in Lottery Annuities, it was agreed that the ſame ſhould be turned into Money, and laid out in a Purchaſe of Lands to be ſettled to the Uſe of the Defendant *John* for Life, then to Truſtees during his Life, to ſupport, *&c.* then to *Elizabeth* the intended Wife for her Life, with Remainder to Truſtees for Two hundred Years, Remainder to the firſt and other Sons ſucceſſively in Tail Male, with Remainder to *William Chambers* in Fee: And it was thereby declared, that the Two hundred Years Term was in Truſt, that in Caſe the Defendant *John* ſhould have a Son, and one or more other Children, then the Truſtees after the Death of *John* and *Elizabeth*, ſhould by Mortgage or Sale raiſe for younger Children, if more than one, 2000 *l.* between them, and Intereſt at 5 *l. per Cent. per Ann.* for their Maintenance; and that till ſuch Purchaſe, the Truſtees with the Conſent of *John* and *Elizabeth*, ſhould let the 6000 *l.* continue in Annuities, and pay the Intereſt to ſuch Perſons as would be intitled to the Lands, and the Truſtees not to be anſwerable for more than they received, or for each other. And by the ſaid Indenture, *William Chambers* covenanted, in Conſideration of the ſaid Marriage,

Marriage, to ſettle ſeveral Lands therein particularly mentioned, to the Uſe of himſelf for Life; then to *John Chambers* in Tail Male, with Remainder to himſelf in Fee. The Marriage took Effect, the 6000*l.* was not laid out in a Purchaſe, but in the Year 1720. by Conſent of *John* and *Elizabeth* and the Truſtees, being in Lottery Annuities, was ſubſcribed into the *South-Sea Company*, whereby a Loſs of about 3000*l.* happened. *William Chambers* was dead, having made no Settlement of the Lands ſpecifically agreed to be ſettled, which therefore were deſcended to the Defendant *John*, his Son, in Fee; the Defendants had Iſſue the Plaintiff, their only Son, and four Daughters, who were likewiſe Defendants: And this Bill was brought to have the Remainder of the 6000*l.* laid out in a Purchaſe, and ſettled purſuant to the Uſes before-mentioned; and the firſt Queſtion was, on whom the Loſs of the Money ſubſcribed into the *South-Sea Company* ſhould fall; and as to that, it was agreed on all Hands, that the Truſtees having ſubſcribed the Lottery Annuities into the *South-Sea Company*, by Conſent of the Defendants *John* and *Elizabeth*, were indemnified therein; not only by the Terms and Covenants in the Settlement, but alſo by the Act of Parliament made in the Year 1720. wherein every one's Conſent was involved; and whereby Truſtees were generally impowered to ſubſcribe Orders and Annuities, *&c.* and therefore it was argued for the Defendants, the Daughters, that the Loſs ſhould fall wholly on the Son; that Lands were of an uncertain Value; and if Lands had been purchaſed, and they had afterwards increaſed never ſo much in Value, by diſcovering of Mines, or otherwiſe, that the Plaintiff, the Son, would have had the whole Benefit thereof, without any Increaſe to the Daughters of their Portions: That in Equity, an Agreement to purchaſe is conſidered as if a Purchaſe were actually made; and there the Loſs ought to fall on the Plaintiff, and the rather, for that if the Stock it ſelf had riſen never ſo high, as it was expected it would, and did riſe to a very great Price, the Daughters could only have their 2000*l.* and therefore, as the Plaintiff was intitled to all the Advantage in Caſe of a Riſe, it was reaſonable he ſhould bear the Loſs now that a Fall had happened; and therefore the Daughters ought not to be contributary to this Loſs. But on the other Side it was argued and decreed, that the Loſs ſhould fall in Proportion on the Daughters, as well as the Son; that the Parties had an equal Regard to the Son, as well as the Daughters; that the Son was to ſuſtain the Name of the Family, and was to take firſt, and more immediately than the Daughters, whoſe Portions came afterwards, by Way of Charge only on the Eſtate; that the Conſtruction contended for was to overthrow one Part of the Settlement; and that if the Loſs had been a little more, the Daughters muſt have had all, and the Sons nothing; that the Parties have aſcertained the Proportion each were to have: And this is the Meaſure the Court ought to guide themſelves by; and accordingly ſent it to a Maſter to take the Account, and to proportion the Loſs between the Parties. *Paſch.* 1730. between *Chambers* and *Chambers*.

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## (B) In what Proportion.

1. IF a Mortgagee deviſes the mortgaged Lands to *A.* for Life, Remainder to *B.* in Fee, and the Mortgagor redeems the Lands, *A.* ſhall have one Third, and *B.* two Thirds of the Mortgage Money; and this *per* Lord Chancellor is the ordinary Rule of the Court in ſuch Caſes. *Mich.* 1682. between *Brent* and *Beſt*, 1 *Vern.* 70.

2. So if one deviſes Lands which are in Mortgage to *A.* for Life, Remainder to *B.* in Fee, *A.* ſhall contribute one Third towards the Diſcharge of the Mortgage: Decreed 1 *Chan. Ca.* 271. *Nel. Chan. Rep.* 220. *S. C.*

3. But if Lands in Mortgage are deviſed to *A.* for Life, Remainder to *B.* in Fee, and *A.* takes an Aſſignment of this Mortgage in a Truſtee's Name, though *B.* might have compelled *A.* to contribute one Third towards Payment of the Mortgage, in Reſpect of his Eſtate for Life; yet if *A.* be dead, and the Bill is brought againſt his Executor, he ſhall be obliged to contribute only in Proportion to the Time that *A.* his Teſtator enjoyed it: Decreed *Trin.* 1686. between *Clyat* and *Battaſon*, 1 *Vern.* 404.

4. *A.* deviſed to *B.* for Life, and after, one third Part of the Reverſion to each of his three Siſters reſpectively, and her Heirs: The Siſters brought a Bill for Diſcovery of Incumbrances on the Eſtate; and to compel the Defendant, Tenant for Life, to bear his Share and Proportion thereof; alledging, that their Reverſion would be of little Benefit to them, if the Debt were ſuffered to increaſe by Non-Payment of Intereſt, *&c.* and charged, that the Defendant had cut down Timber, for which he ought to be accountable: The Court decreed the Defendant to pay *two* Parts in *five* of the Debts, and the Plaintiffs the Reverſioners the other remaining three *Fifths*, and the Defendant to account for the Timber; and what was raiſed by it to be taken as ſo much in Part of what the Reverſioners were to pay. *Paſch.* 1692. between *Humphreys* and *Hales*, 2 *Vern.* 267.

5. If by a Settlement two Eſtates, the one in *Norfolk*, and the other in *Suffolk*, are ſubjected to the raiſing a Portion of 2000 *l.* for a Daughter, by a Term of a hundred Years, commencing after the Deceaſe of two ſeveral Lives; the one upon *Suffolk* Eſtate, and the other on the *Norfolk* Eſtate; and the Life on the *Suffolk* Eſtate falls, and the Daughter brings her Bill for the 2000 *l.* and *J. S.* to whom that Eſtate was come, pays the 2000 *l.* And afterwards the Life on the *Norfolk* Eſtate falls, by which the Fee-ſimple thereof deſcends on the Daughter. *J. S.* who paid the 2000 *l.* ſhall have Contribution out of the *Norfolk* Eſtate in Proportion to its Value, only the *Suffolk* Eſtate ſhall be valued as an Eſtate in Poſſeſſion, and the *Norfolk* Eſtate, as an Eſtate in *Reverſion*: Decreed *Hill.* 1697. between *Henningham* and *Henningham*, 2 *Vern.* 355.

# CAP. XIX.

## Copyhold.

(A) Concerning the Power of Chancery over Copyhold Eſtates, the Acts of Lords and Tenants, and in what Caſes it has been exerted.

(B) In what Caſes a defective Surrender, or the Want of it, will be ſupplied in Equity.

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## (A) Concerning the Power of Chancery over Copyhold Eſtates, the Acts of Lords and Tenants, and in what Caſes it has been exerted.

1. IF the Lord will turn out his Copyholder, who payeth his Cuſtoms and Services, or will not admit him to whoſe Uſe a Surrender is made, or will not hold his Court for the Benefit of a Copyholder, or will exact arbitrary Fines, when they are cuſtomary and certain, the (*a*) Copyholder ſhall have a *Subpœna* to reſtrain or compel him, as the Caſe ſhall require. *Cary* 3, 4.

(*a*) Copyholders were formerly Tenants at Will of the Lord, their Lands being Parcel of the Lord's Demeſnes; but now thoſe Copyholders ſtand on a ſurer Foundation, if they perform thoſe Duties which their Tenure requires; for if the Lord turns them out, they may either ſue a *Subpœna* out of Chancery to be relieved, or have an Action of Treſpaſs againſt the Lord; for though they are Tenants at Will of the Lord, yet they are Tenants at Will according to the Cuſtom of the Manor, which the Lord cannot break without Reaſon. *Co. Lit.* 60. *b.* 61. *a.* 4 *Rep.* 21. 9 *Rep.* 79. Preſcription, and that the Lands are Parcel of the Manor, are incident to, and the very Pillars on which every Copyhold Eſtate ſtands. 4 *Rep.* 24. 1 *Inſt.* 58. *b.* Cuſtom is the Life and Soul of Copyhold Eſtates; for if Copyholders break their Cuſtom, they are ſubject to the Lord's Will; the Cuſtoms of Manors are ſo various, that it is impoſſible to aſcertain them, they muſt, however, be Time out of Mind; they muſt be reaſonable, according to common Right; they muſt be upon good Conſideration; they ought to be compulſory, not left to the Liberty of the Tenant, to obſerve or not obſerve them; they ought to be certain; they ought to be beneficial to the Lord or Tenant: And if there are not Cuſtoms to direct Copyhold Eſtates, they muſt be directed by the Rules of the Common Law. 1 *Inſt.* 58. *Coke's Comp. Cop.* 33.

2. Equity will oblige the Lord to hold a Court, *Cro. Jac.* 368. for no Action on the Caſe will lie againſt him, if he refuſes; and therefore there is no Remedy but in Chancery. 2 *Bulſt.* 336.

3. If an erroneous Judgment be given in a Copyhold Court in a *Formedon*, or the like, a Bill may be exhibited in Chancery to reverſe it. 1 *Rol. Abr.* 373. A Bill may be exhibited, altho' the King is Lord of the Manor. *Lane* 98.

4. The Court of Chancery has exerciſed a Juriſdiction in rectifying and reverſing the Judgments given in Copyhold Courts, whenever they appeared unjuſt and unreaſonable; but for any Errors in Matters of Form, Equity will not interpoſe. *Vide* 1 *Inſt.* 60. *Owen* 63. *Moor* 68. 4 *Rep.* 30. 1 *Rol. Abr.* 60.

5. A Bill was exhibited to compel the Dean and Chapter of St. *Paul's*, as Lords of the Manor of ——, to receive a Petition in Nature of a Writ of falſe Judgment, to reverſe a Common Recovery ſuffered in the Manor Court about thirty Years before, whereby a Remainder in Tail was barred, ſuggeſting ſeveral Errors in the Proceedings therein; and though in Truth the Errors aſſigned were ſuch as would be groſs Errors in a Freehold Eſtate; yet my Lord Chancellor *Jefferies* diſmiſſed the Bill. Between the *Dean and Chapter* and *Lewis Ruggle*, 1 *Vern.* 367. from which Decree of Diſmiſſion there was an Appeal to the Houſe of Lords; and there the Decree was affirmed. *Show. P. C.* For Common Recoveries, not being adverſary Suits, but common Aſſurances, Equity ought rather to ſupply Defects than to aſſiſt in the Annulling of them.

6. A Copyholder of Lands in Fee, where by the Cuſtom of the Manor, the Lord had, as a Profit *apprendre*, the Cut of the Woods and Underwoods growing on the Copyhold, obtains a Grant from the Lord of all the Woods and Underwoods growing, or which hereafter ſhould grow on the ſaid Copyhold Lands, to him and his Heirs; and it was held, that this ſhould not merge in the Copyhold, altho' it was alledged to be only a Profit *apprendre*; and tho' it was urged, that if a Copyholder pays a Rent to the Lord, and the Lord grants or releaſes this Rent to his Tenant, that this ſhall merge in the Copyhold. *Mich.* 1681. between *Fawlkner* and *Fawlkner*, 1 *Vern.* 21, 22.

7. If *A.* Tenant in Tail of a Copyhold, Remainder to himſelf in Fee, purchaſes the Freehold of the Lord, and then ſells to *J. S.* and dies; and after thirty Years Poſſeſſion, the Son of *A.* ſets up a Title as Iſſue in Tail, the Purchaſer ſhall hold againſt him, the Freehold having attracted the other Eſtate which was at Will. *Hill.* 1685. between *Parker* and *Turner*, 1 *Vern.* 393.

8. If a Copyholder in Fee takes an Infranchiſement of his Copyhold in the Name of a Truſtee, and deviſes the Land to his younger Son, who ſells to *J. S.* and the Heir at Law recovers in Ejectment, as he might do upon his Anceſtor's Admittance, and *J. S.* the Vendee, brings his Bill, he ſhall be relieved in Equity, and hold againſt the Heir. Decreed *Hill.* 1685. between *Dancer* and *Evett*, 1 *Vern.* 392.

9. If a Copyhold is granted to three ſucceſſively, and there is no Cuſtom proved, that the firſt Taker had Power of diſpoſing of the Whole, nor that the firſt Taker paid the Purchaſe-Money; it ſhall not go to the Executor of the firſt Taker, but ſhall go in Succeſſion. *Paſch.* 1692. between *Rundle* and *Rundle*, 2 *Vern.* 264.

10. But if by the Cuſtom the firſt Taker may diſpoſe of the Whole, and he likewiſe pays the Purchaſe-Money, it ſhall not be a Truſt for the other Two, but ſhall go to his Executor. 1 *Chan. Ca.*

310. Altho' it was objected, that the Heir, or Executor cannot be intitled to the Truſt of a Freehold for Life: But *vide* 2 *Vern.* 264. where it is held, *per Cur'*, that an Executor or Adminiſtrator is intitled to the Truſt of an Eſtate (*b*) *pur auter vie*, whether Freehold or Copyhold, or an Office; and *vide* the Statute 4 & 5 *Ann.*

(*b*) There can be no Occupant of a Copyhold Eſtate *pur auter vie*, for the Prejudice it would do the Lord; for upon the Death of the Tenant the Lord ſhall enter immediately. *Per Holt* C. J. 1 *Salk.* 188.

11. If a Copyholder for Life, where by the Cuſtom there is a Widow's Eſtate, agrees that *J. S.* ſhall hold and enjoy it during his Life and the Widowhood of ſuch Woman as he ſhould leave at his Death, and enters into a Bond for that Purpoſe; yet the Widow ſhall not be bound by that Agreement. Decreed *Paſch.* 1688. between *Muſgrave* and *Daſhwood*, 2 *Vern.* 63.

12. The Widow of *Ceſtui que Truſt* of a Copyhold Eſtate ought to have her *Free Bench*, as well as if the Husband had the legal Eſtate in him. 2 *Vern.* 585. *per Curiam.*

13. Copyholds cannot be intailed within the Statute *de donis*, but they may by Common Law, and then Surrenders or Plaints in Nature of Fines and Recoveries may bar them, as well in the Court-Baron as at Common Law, if the Cuſtom has been ſuch, which is the Rule in thoſe Caſes. *Cary* 30. That Copyholds may, by Cuſtom, be intailed; yet that ſuch Intail is not within the Statute *de donis*, *vide* 2 *Chan. Ca.* 174. 2 *Vern.* 585. And if there be no particular Cuſtom for barring the Intail, a Surrender will do it. *Per Curiam*, 2 *Vern.* 705.

(*c*) Fines are due by Change of the Lord or the Tenant, by Death only, and according to Cuſtom; for if it were by Change of the Lord, upon Alienation, the Copyholder might be oppreſſed by a Multitude of Fines, by the Lord's own Act. 1 *Inſt.* 59, 60.

14. Tenants by Copy ſhall not pay any uncertain (*c*) Fines by Change of their Lords by Alienation, but by Death, which is the Act of God; for otherwiſe the Lord might oppreſs the Tenant by frequent Alienations. *Cary* 9.

(*d*) If the Fine demanded is unreaſonable, the Copyholder is not obliged to pay it; and though he himſelf only thinks it unreaſonable, and afterwards it is adjudg'd reaſonable; yet it is no Forfeiture becauſe it is a Matter of Controverſy. 1 *Rol. Abr.* 505. 13 *Rep.* 2.

15. If the Lord inſiſts upon an extravagant Fine for a Renewal, he ſhall be reſtrained to what is (*d*) reaſonable, altho' the Fine is arbitrary and uncertain; but having demanded ten or twelve Years Value of the Land, the Court decreed him only two. 2 *Chan. Rep.* 134. *Nel. Chan. Rep.* 154. an arbitrary Fine moderated in Equity.

16. But where a Copyholder in Fee made a conditional Surrender for ſecuring a Sum of Money at the End of ſix Months; the Money not being paid, and the Mortgagee willing to continue his Money, they deſired the Lord that the old Surrender might be taken up, and a new one made for ſix Months longer; but the Lord inſiſted on an arbitrary Fine of two Years Value, and that the Mortgagee ſhould come in and be admitted; and the Court being of Opinion, that Equity could not relieve againſt the Fine, the Matter was ended by Compromiſe, and a Fine of 40 *l.* paid to the Lord, the Eſtate being 100 *l. per Annum. Mich.* 1699. between *Tredway* and *Fotherby*, 2 *Vern.* 367.

17. If an Infant Copyholder is admitted, and the Lord committeth the Cuſtody of him to his Mother, and the Infant's Tenant commits a Forfeiture by cutting down Trees, which being preſented and found a Forfeiture, the Lord enters during the Infant's Nonage, and the Land is held by him and his Heirs forty Years; yet the Copyholder ſhall have Relief. *Cary* 8.

18. A Copyholder for Life had committed a Forfeiture by Cutting of Timber-Trees, which was found ſuch by a Trial and Verdict at Law, and the Lord entred and admitted the Defendant, who was the Remainder-Man; the Copyholder exhibited his Bill to be relieved againſt the Forfeiture, offering, that if it ſhould appear to be Waſte, to make Satisfaction; and an Iſſue being directed to try, whether it was the primary Intention in cutting the Timber to do Waſte; and it being found for the Plaintiff, it was decreed he ſhould be relieved, and that the Defendant, the Remainder-Man, ſhould deliver Poſſeſſion, and Account for the meſne Profits. *Hill.* 19 *Car.* 2. between *Thomas* and *Porter*, 1 *Chanc. Ca.* 95.

19. *A.* having two Copyholds held of the Manor of *B.* cuts Timber (pretending a Cuſtom for it) on the one, and employs it in repairing the other; the *Lord* brought an Ejectment, ſuppoſing this to be a voluntary Waſte and a Forfeiture; and upon the firſt Trial there was a Verdict againſt the Lord; but upon a new Trial there was a Verdict for the pretended Cuſtom; and it being admitted, that by the Cuſtom of the Manor, when Timber was wanting on one Copyhold Tenement, the Lord, by his Bailiff, might aſſign Timber for Repairs on any other of the Copyhold Eſtates: My Lord Keeper relieved againſt the Forfeiture on Payment of the Coſt of both the Trials at Law, and likewiſe of this Suit. *Hill.* 1705. between *Naſh* and the Earl of *Derby*, 2 *Vern.* 537.

20. The Plaintiff brought his Bill to be relieved againſt a Forfeiture of his Copyhold Eſtate; and the Caſe appearing to be, that he had been guilty of the greateſt Diſobedience poſſible to his Lord; that after ſix ſeveral Preſentments upon him to repair it, and an Entry by the Lord for the Forfeiture, he brought an Ejectment; and when upon the Trial, a Rule was entred into by Conſent, and made a Rule of Court, that upon Payment of 4 *l.* to the Lord for his Coſts, (which were not a fourth Part of the Coſts he had put the Lord to) and putting the Eſtate into Repair, he ſhould be admitted to it again; yet he never complied with the Rule, nor made any Offer of Coſts to the Lord; but inſtead of that brought another Ejectment, and was nonſuited; and now after nine or ten Years Time more brings his Bill, and had been ſeveral Times amerced for not appearing at the Court, and refuſed to do Fealty, either upon Oath, or (being a Quaker) upon Affirmance; and upon theſe Circumſtances my Lord Keeper declared he ought to have no Relief; or if he were to be relieved, yet it muſt be upon Payment to the Lord of all his Coſts, and putting the Eſtate into good Repair, which would be more Charge to him than his Intereſt in the Eſtate would be worth, having only an Eſtate for Life therein, and diſmiſſed the Bill, but with Coſts; and my Lord Keeper likewiſe declared, that though this were a voluntary Waſte and Forfeiture (againſt which it was objected this Court never gave Relief); yet he thought the Rules of Equity not ſo ſtrict, but that Relief might even be given againſt vo-

luntary Waſte and Forfeiture. *Mich.* 1710. between *Cox* and *Higford*, 2 *Vern.* 664. *S. C.* confuſedly ſtated.

## (B) In what Caſes a defective Surrender, or the Want of it, will be ſupplied in Equity.

1. IF a Man deviſes a Copyhold Eſtate to a Charity, it ſhall be a good Appointment within the Statute of Charitable Uſes, though there was no Surrender to the Uſe of his Will. *Nel. Chan. Rep.* 75.

2. If *A.* contracts with *B.* for the Purchaſe of a Copyhold Eſtate, and pays the Purchaſe-Money, and *B.* agrees to ſurrender the Premiſſes at the next Court, but dies before the next Court, or any Surrender made, Equity will ſupply the Want of the Surrender. Decreed *Hill.* 33 *Car.* 2. between *Barker* and *Hill*, 2 *Chan. Rep.* 218.

3. A Man ſeiſed of a Copyhold Eſtate, borrowed 400 *l.* of the Plaintiff 1698. and ſurrendered into the Hands of two cuſtomary Tenants the Copyhold in Queſtion, to be preſented at any Court after *Sept.* 1699. defeaſible on paying the 400 *l.* and Intereſt; the Mortgagor paid the Intereſt for four Years together; but no Care was taken to get the Surrender preſented; and in the mean Time the Mortgagor became a Bankrupt, and died Inteſtate and inſolvent. After his Death the Surrender was tendred, but the Homage refuſed to preſent it; becauſe by the Cuſtom of the Manor confirmed by Act of Parliament, all Surrenders were to be void, if not preſented in *twelve* Months after they were made; and my Lord Chancellor (tho' he at firſt doubted) decreed, that the Surrender ſhould be ſupplied againſt the Aſſignees. *Mich.* 1706. between *Taylor* and *Wheeler*, 2 *Vern.* 565.

4. So in a Caſe where *A.* lent *B.* 200 *l.* on a Surrender of ſome Copyhold Lands, which *A.* neglected to get preſented at the next Court, and was therefore void, according to the Cuſtom of the Manor, tho' *B.* afterwards ſold thoſe Lands to *J. S.* who took a Surrender, which he preſented, and was admitted; yet he having Notice of *A.*'s Right, my Lord *Chancellor* decreed againſt him, and that *A.*'s defective Surrender ſhould be made good. *Paſch.* 1708. between *Jennings* and *Moor*, 2 *Vern.* 609.

5. *A.* Tenant in Tail of the Truſt of a Copyhold Eſtate, with Remainder over, and the Truſtees refuſing to ſurrender the legal Eſtate to him, he brings his Bill to compel them; and pending that Suit he goes to the Lord's Court, and offers to ſurrender, but is refuſed, not having the legal Eſtate; and thereupon he makes his Will, and deviſes his Eſtate to his Wife and Children: The Court conceiving the Will ſufficient to bar the Intail of a Truſt, and he having done all he could, decreed the Eſtate to go according to the Will. *Hill.* 1706. between *Otway* and *Hutton*, 2 *Vern.* 585. *Ceſtui que Truſt* of a Copyhold Eſtate, having an equitable Intereſt only, may deviſe it without any Surrender. 2 *Vern.* 680. *per Curiam.*

6. If a Proviſion is made by Will for younger Children out of ſome Copyhold Lands, and there is a Defect in the Surrender, Equity will ſupply ſuch Defect againſt the eldeſt Son and Heir at Law. Decreed *Hill.* 1682. between *Hardham* and *Roberts*, 1 *Vern.* 132. and many Precedents ſaid to be in Court of the like Nature.

7. So Equity will ſupply the Want of a Surrender of a Copyhold, as well for an elder Son as a younger, in Caſe of *Gavelkind* Copyhold. *Vide* 2 *Vern.* 163. and ſeveral Precedents there cited of Surrenders ſupplied in Favour of younger Children, Creditors and Purchaſers.

8. But where one deviſed a Copyhold Eſtate to his Grandſon; and my Lord *Somers* decreed the Will good, and that Equity ought to ſupply a Surrender in ſuch Caſe, as well as in Caſe of a Son; yet on Appeal the Houſe of Lords reverſed the Decree, and held, that Equity ought not to ſupply ſuch Defect in Diſfavour of the Heir at Law, unleſs it were in Favour of a Son or Daughter, nor then neither, if it was to diſinherit the eldeſt Son. Between *Kettle* and *Townſend*, 1 *Salk.* 187.

9. A Man ſeiſed of Lands, which by the Cuſtom of the Manor could only paſs by Deed, Surrender and Admittance, and having a natural Daughter does by Deed, in Conſideration of 300*l.* therein mentioned to be paid by the ſaid Daughter, grant and convey thoſe Lands to her and her Heirs; and ſhe was admitted accordingly; but no Surrender was made of thoſe Lands, as the Cuſtom required; and at the Foot of the Admittance was a *Proviſo*, that her reputed Father ſhould hold and enjoy thoſe Lands for his Life; alſo in the Deed was a Covenant for farther Aſſurance; no Money was proved to be paid by her; and it being agreed that this Conveyance was defective for Want of a Surrender; the Queſtion was, whether Equity could ſupply it in Favour of a natural Daughter; and it was held, that it could not, that tho' her Father might be obliged by the Law of Nature to provide for her, yet here ſhe was to be conſidered as a meer Stranger to him; that tho' the Father might have a great Affection for her, yet that was no ſuch Affection as would raiſe an Uſe at Law; that the Covenant for farther Aſſurance being only auxiliary, and depending on the original Conveyance, if that were void, the Covenant muſt be void or repugnant; and decreed accordingly. *Mich.* 1717. between *Furſaker* and *Robinſon*.

10. A Man deviſed his Copyhold, being *Burrough Engliſh*, to his eldeſt Son, and deviſed Houſes to his youngeſt Son, which Houſes were ſoon afterwards burnt down, and never entred upon by the younger Son; and as this Caſe was circumſtanced, the Court would not ſupply the Want of a Surrender in Favour of the eldeſt Son. *Paſch.* 1692. between *Cooper* and *Cooper*, 2 *Vern.* 265.

11. A younger Son brings a Bill, and ſurmiſes that a Copyhold, which his Father had deviſed to him by Will, was ſurrendred to the Uſe of his Will, or however, that being for the Advancement of a Child, it ought to be made good here: He made no Proof of any Surrender, nor that a Court was called for that Purpoſe, nor any Proof that any of the Court-Rolls were loſt (which was pretended); and he was well provided for without this Copyhold; and the elder Brother was in Poſſeſſion twenty Years by Conſent of the Plaintiff; ſo the Bill was diſmiſs'd, with Coſts. *Paſch.* 1700. between *James* and *James*.

12. A Man ſeiſed of Freehold and Copyhold Land, deviſes both for Payment of Debts and Legacies, but the Copy was not ſurrendred to the Uſe of his Will, and the Freehold was ſufficient for the Debts; and the Queſtion was, whether the Court would ſupply the Want of the Surrender, and lay the Legacies on the Freehold, and the Debts

on

on the Copyhold, as when there are ſimple contract Creditors, and Bond or Judgment Creditors, and perſonal Aſſets not ſufficient to pay both; and the Maſter of the Rolls held, that the Want of a Surrender could not be ſupplied for the Sake of the Legatees; and he ſaid that it was never yet done, eſpecially where they are meer Strangers, as here, and diſmiſſed the Bill. *Hill.* 1699. between *Rafter* and *Stock.*

13. A Man ſeiſed of ſome Freehold Eſtate, and alſo of a Copyhold Eſtate, deviſed all his Real and Perſonal Eſtate for the Payment of his Debts, and died without any Surrender of the ~~Perſonal~~ Eſtate; and the Freehold and Perſonal Eſtate not being ſufficient for the Payment of the Debts, it was urged, that a Surrender ſhould as well be ſupplied in this Caſe, as if no Freehold Eſtate had been deviſed at all; but my Lord Chancellor ſaid, he thought the Precedents had not gone ſo far, and that he could not relieve in this Caſe, principally, becauſe the Teſtator's Intention did not appear to him to paſs the Copyhold Eſtate by a Deviſe of his Freehold, a Copyhold being of the loweſt Regard, and looked upon in the Eye of the Law, but as an Eſtate at Will. *Trin.* 1715. between *Challis* and *Casborn.*

14. A Man being ſeiſed of ſeveral Freehold and Copyhold Lands in *Bereford*, the Freehold being about 72 *l. per Ann.* and the Copyhold about 16 *l.* and being alſo ſeiſed of another Freehold Eſtate in *Ailsbury* of about 3 *l. per Ann.* and all the ſeveral Eſtates abovementioned, being in Mortgage for 600 *l.* the Mortgagor made his Will, and thereby deviſed all his Lands in *Bereford* to his Wife and her Heirs, and died without Iſſue, leaving his Brother, who was his Heir at Law, and whether this Court would ſupply the Want of a Surrender to the Uſe of his Will, as to the Copyhold Lands in *Bereford*, was the Queſtion; and the Maſter of the Rolls was of Opinion, that it ought not; 1*ſt*, Becauſe the Words of the Deviſe are ſatisfied by the Freehold Lands in *Bereford*, which paſſed thereby; and therefore it was not certain that he intended to give her the Copyhold likewiſe; but, 2*dly*, If he had ſo intended, yet the Brother, who was his Heir at Law, would thereby be diſinherited of almoſt the whole Eſtate, and have nothing but the 3 *l. per Annum* in *Ailsbury*; and though the Court will in all Caſes ſupply the Want of a Surrender for Payment of Debts, yet not for the Wife againſt an Heir at Law, who would be diſinherited thereby, or for younger Children againſt an Elder, to make them in a better Condition than the Elder. *Mich.* 1729. between *Roſs* and *Roſs.*



CAP.

# CAP. XX.

## Costs.

### (A) Who shall pay Costs, and in what Cases.

1. IF an Executor is Defendant in Equity, and there is a Decree againſt him, yet he ſhall not pay (*a*) Coſts, though an Executor, Defendant at Law, pays Coſts in all Caſes, for he cannot plead it at Law in Excuſe of Aſſets. *Hard.* 165.

(*a*) The Awarding of Coſts, is a Matter diſcretionary in the Court, and its Power herein always exerciſed according to the Circumſtances of the Caſe, and the Litigiouſneſs of either of the Parties; if the Court cannot relieve againſt a Forfeiture, the Bill will be diſmiſſed without Coſts; frequently each Party is to bear his own Coſts; the Expence either Party is put to by the Delays, Contempts, *&c.* of the other, are only remitted or purged by the Payment of Coſts, unleſs the Court order otherwiſe: Executors, Guardians, Truſtees, are uſually exempt from Coſts, or awarded Coſts out of the Eſtate in their Hands, unleſs they have greatly misbehaved themſelves; alſo an Heir at Law, in moſt Caſes, is exempted from paying Coſts.

2. A Solicitor proſecuted a Suit in the Name of a Stranger, who not being to be found, the Maſter of the Rolls declared, that if there were one Precedent in the Caſe, he would make another, and order the Solicitor to pay Coſts. 1 *Chan. Ca.* 71.

3. *A.* brought a Bill *in Forma Pauperis*, to which the Defendant put in a Plea and Demurrer, which were both over-ruled; and it was inſiſted upon, that he ſhould have no Coſts, being at none; but my Lord *Sommers*, after long Debate and Inquiry of all the antient Counſel and Clerks, who agreed that he ſhould have Coſts, ordered him his Coſts like other Suitors; for tho' he is at no Coſts, or but ſmall Coſts; yet the Counſel and Clerks do not give their Labour to the Defendant, but to the *Pauper*. *Paſch.* 1701. between *Scatchmer* and *Foulkard*.

4. If a Bill be brought to call a Truſtee to an Account, and he by Anſwer ſubmits readily to it, tho' on the Account he be found in Debt, yet he ſhall pay Intereſt for the Balance only from the Time of the Account liquidated, and no Coſts if he has not misbehaved himſelf. *Hill.* 1705. between *Parrot* and *Treby*.

5. If a new Trial, or a ſecond Iſſue be directed, it muſt be upon Payment of Coſts. 2 *Vern.* 75.

6. A Demurrer was allowed, but without Coſts, becauſe it came in by Commiſſion without any Anſwer. 1 *Vern.* 282.

7. If a Feme Sole exhibits a Bill, and pending the Suit, marries, and the Baron and Feme bring a Bill of Revivor, and obtain a Decree with Costs, they shall have the Costs of the whole Suit, excepting the Bill of Revivor; altho' it was objected, that the Abatement was the Party's own Act; and that if the Defendant had been in the Right, and so to have Costs, yet he could not have compelled the Plaintiffs to revive. *Pasch.* 1685. between *Durbain* and *Knight*, 1 *Vern.* 318. *that he might have compelled them to revive*, vide *Title* Abatement and Revivor, *Letter* (A).

8. Upon a Motion to dismiss a Bill, wherein the Plaintiff had proceeded to an Answer only, with twenty Shillings Costs. *Per* Lord Keeper, that was a Rule made at least fifty Years since; and there is no Reason, if a Defendant has been put to greater Charge, why he should not have his full Costs, and that for the Future it should be referred to a Master to tax Costs in such Cases. *Hill.* 34 *Car.* 2. 1 *Vern.* 116. 1 *Vern.* 334. Like Order made.

9. If a second Mortgagee brings a Bill to redeem the first Mortgage, who had been put to great Charge in foreclosing the Mortgagor; the Cost which the first Mortgagee has been at shall not be taxed, as in Case of an adversary Suit, but he shall be allowed all his Costs and Charges, as is done in Case of a Solicitor who lays out Money for his Client; and the Profits of the mortgaged Premisses shall be first applied to pay off those Costs before it goes to sink the Principal. Decreed *Mich.* 1690. between *Lomax* and *Hide*, 1 *Vern.* 185.

10. A Bill of Exchange was obtained by Fraud and ill Practice; and the Court declaring it a gross Fraud, ordered the Party Costs to be ascertained by his Oath. 2 *Vern.* 123.

11. If a Copyholder commits a Forfeiture, which is found so at Law, and he afterwards exhibits a Bill to be relieved, it must be on Payment of Costs both at Law and in Equity. 2 *Vern.* 537. But if it were in such a Case, as that the Court could not relieve, yet they would not decree Costs against him.

12. The Commissioners of Charitable Uses cannot decree Costs on the Statute 45 *Eliz.* but if there be an Appeal from their Decree, my Lord Chancellor may decree the Costs, not only of the Appeal, but likewise of the Commission; and tho' they decree Costs, yet that shall not, upon an Appeal, be sufficient to reverse the Decree; for my Lord *Chancellor* may either increase or lessen the Costs, or exempt the Party from them intirely. *Pasch.* 1700. between *Rockley* and *Keyly*.

CAP.

# CAP. XXI.

## Courts and their Jurisdiction.

(A) Concerning the Jurisdiction of the ordinary and limited Court in Chancery, proceeding according to Law.

(B) Concerning the Jurisdiction of the extraordinary and unlimited Court in Chancery, proceeding according to Equity.

(C) Concerning the Jurisdiction of Chancery in Foreign Parts.

(D) Concerning the Jurisdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.

(E) How far Chancery will exert a Jurisdiction in Matters cognizable in Inferior Courts, as the Ecclesiastical Courts, University-Courts, Chester, Durham, &c.

### (A) Concerning the Jurisdiction of the ordinary and limited Court in Chancery, proceeding according to Law.

1. IN Chancery there are two Courts, the one *Ordinary*, which proceeds according to the Laws and Statutes of the Realm, called the *Petty Bag* Side, and which has been a Court Time out of Mind: The other is called the *Extraordinary Court*, and proceeds according to the Rules of Equity. 4 *Inst.* 79. 2 *Inst.* 552.

2. The

2. The (*a*) ordinary Court hath Power to hold Plea of *Scire Fac.* for Repeal of the King's Letters Patent, *Monſtrans de droits*, Traverſes of Offices, Petitions in Chancery, of *Scir. Fac.* upon Recognizances in this Court, Writs of *Audita Querela*, and *Sci. Fac.* in Nature of an *Audita Querela*, Dowments in Chancery, the Writ *de dote Aſſignanda* upon Offices found, Executions upon Statute Staple or Recognizances, in Nature of a Statute Staple upon the Act 23 *H.* 8. but the Execution upon a Statute Merchant is returnable either into the *K. B.* or *C. B.* 4 *Inſt.* 80.

(*a*) This Court had heretofore great Extent of Juriſdiction and Multiplicity of Buſineſs, eſpecially whilſt Tenures remained as they were at the Common Law, and before the Erection of the Court of *Wards*. To this Day there are held in this Court, Pleas of *Scire Facias* for Repeal of the King's Letters Patent, Petitions, *Monſtrans de droit*, Traverſes of Offices, *Scire Facias*, upon Recognizances, Executions upon Statutes and Pleas of all perſonal Actions, by or againſt an Officer or Miniſter of this Court.

3. This Court is *Officina Juſtitiæ*, out of which all original Writs and Commiſſions which paſs under the great Seal, do iſſue; and for theſe Ends this Court is always open, ſo that One from hence may in Vacation have a *Habeas Corpus*, Prohibition, *&c.* which iſſue out of other Courts only in Term-Time. 4 *Inſt.* 80, 81.

4. All Perſonal Actions, by or againſt any Officer or Miniſter, in Reſpect of their Service or Attendance, may be determined in this Court. 4 *Inſt.* 80.

5. This Court cannot hold Plea of Land, but it may of Treſpaſs or Debt. 20 *H.* 6. 32.

6. The Proceedings in this Court are all in *Latin*, but they are not inrolled in Rolls, but remain *in Filaciis*. 4 *Inſt.* 80.

7. If the Parties deſcend to Iſſue, this Court cannot try it by a Jury, but the Lord Chancellor delivereth the Records with his proper Hands into the King's Bench, to be tried there; becauſe for that Purpoſe both Courts are accounted but one, and after Trial had to be (*b*) remanded into Chancery, and there Judgment to be given: But if there be a Demurrer in Law, it ſhall be argued and adjudged in this Court. 4 *Inſt.* 80.

(*b*) But *Quære* whether the conſtant Practice has not been to give Judgment in the King's Bench. *Vide All.* 16, 17. *Hill.* 84, 94. *Cro. Jac.* 12. 2 *Roll. Abr.* 349. and 2 *Sand* 27. where it is reſolved, that if there be a Demurrer for Part, and Iſſue for Part, the whole Record ſhall be tranſmitted into *B. R.* and the Judgment given there; and 2 *Sand.* 23. *S. P.* and there ſaid, that the Books cited 4 *Inſt.* 80. do not warrant the Opinion. But if the Iſſue is to be tried otherwiſe than by a Jury, as by the Biſhop's Certificate, *&c.* Judgment ſhall be given in Chancery. 1 *Jon.* 80. *Lat.* 3.

8. An Inquiſition was taken, and a Forfeiture of the Office of Warden of the *Fleet* found, and the Defendant pleaded to Iſſue; and after Iſſue joined, ſeveral other Perſons came in by Way of *Monſtrans de droit*, and pleaded; and a Demurrer to them; and the Record was carried into *B. R.* by the Clerks of the *Petty Bag*, without any Order of the Court, in Order to have the Iſſue tried. And now two Queſtions were moved; 1*ſt*, Whether the Record were well removed, becauſe it was done by the Clerks of the *Petty Bag*, becauſe it ought to be by the Lord Chancellor *Propria Manu*. 2*dly*, Whether the Record be intirely removed, there being an Iſſue as to one, and a Demurrer to the Reſt. As to the firſt Point, my L. *Keeper* was of Opinion clearly, that the Record was well removed; for what is done by the Hand of the proper Officer of the Chancellor, may be well enough ſaid to be done by him

*Propria Manu.* And though the Clerk of the *Petty Bag* carrying the Record without an Order, has committed a Fault to this Court, yet that will not prevent the Record from being well removed; And as to the 2*d.* he was of Opinion that the Record was intirely removed, on Conſideration of the Caſes of *Jefferſon* and *Dawſon*, 2 *Saund.* 6. The *King* and *Stoughton*, 2 *Saund.* 157. and the *Prince*'s Caſe, 8 *Co. Mich.* 1700. between the *King* and the *Warden* of the *Fleet.*

9. In a Cauſe on the *Latin* Side, on a Motion that the Defendant might ſtand committed for not vacating his Letters Patent of Repriſals, it was moved that they might be at Liberty to bring a Writ of Error in the King's Bench, for which was cited *Dyer* 315. 4 *Inſt.* 80, *&c.* But my L. *Keeper* ſaid, all theſe Books were founded only on the ſingle Opinion of my L. *Dyer*; and tho' he thought the Juriſdiction of Chancery, even of the *Latin* Side, not ſubjected unto, nor to be controuled by the King's Bench; and that he would (*c*) enjoin all ſuch Writs of Error. *Hill.* 1682. between the *King* and *Cary.*

(*c*) That upon a Judgment given in this Court, a Writ of Error doth lie returnable into the King's Bench. *Vide* 13 *Ed.* 3. 25 *Aſſ.* 24. *Dyer* 315. *Plow.* 393. and *per* L. *Coke:* The Stile of the King's Bench is *coram Rege*, but the Stile of the Chancery is *coram Rege in Cancellaria*, and *Additio Probat Minoritatem.* 4 *Inſt.* 80.

## (B) Concerning the Juriſdiction of the extraordinary or limited Court in Chancery, proceeding according to Law.

1. THE King cannot grant a Commiſſion to determine a Matter of Equity, but it ought to be determined in Chancery, which hath had (*a*) Juriſdiction Time out of Mind. 12 *Co.* 113.

(*a*) That all the Courts of *Weſtminſter*, *viz.* the Chancery Proceeding according to Law, King's Bench, Common Pleas, and Exchequer, have had Juriſdiction Time out of Mind, ſeems ſettled by the beſt Authorities. 9 *E.* 4. 53. *b.* *Doctor* and *Student*, *c.* 7. 4 *Inſt.* 78. *Hob.* 63. but at what Time the Court of Chancery firſt exerciſed an extraordinary Power of acting and decreeing according to the Rules of Equity, ſeems from the Diſtance and Obſcurity of the Matter very doubtful: It is however agreed, that its Commencement is much more modern than any of the other Courts; that neither the *Mirror*, *Glanvil*, *Bracton*, *Britton*, or *Fleta*, mention any Thing of this Court, as proceeding according to the Rules of Equity. The moſt probable Opinion is, that the Equity Side of the Court of Chancery began in the Time of *E.* 3. *Lambard* in his *Archaion.* 62. ſays, that when the Courts of Chancery and King's Bench ceaſed to be Ambulatory, and became ſettled Courts in a certain Place, (*which was the* 4 *E.* 3.) that then the King committed to his Chancellor, together with the Charge of the Great Seal, his only legal, abſolute, and extraordinary Pre-eminence of Juriſdiction, *&c.* but the Writ or Proclamation, 22 *E.* 3. directed to the Sheriffs of *London*, by them to be made publick, ſeems to have given it an Eſtabliſhment, by which the King commanded, that all Buſineſs relating as well to the Common Law of the Kingdom, as to ſuch by ſpecial Grace cognizable by him, ſhould be proſecuted before the Chancellor, *&c.* and this Delegation afterwards received the Sanction of an Act of Parliament, 36 *E.* 3. which Act is thought, by others, to have firſt given it Authority. *Vide* 1 *Lev.* 242. that this Court did from this Time exerciſe a Juriſdiction in Matters of Equity, ſeems evident from the Rolls of Parliament. *Vide* 1 *Rol. Abr.* 372. And the Complaints made in Parliament of the Exerciſe of this Power to the Subverſion of the Common Law. *Vide Rot. Parl. Anno* 2 *R.* 2. 7 *R.* 2. and this occaſioned the Statute 13 *R.* 2. *c.* 6. which reciting, that People were compelled to come before the King's Council, or in the Chancery, by Writs grounded on untrue Suggeſtions, Enacts, That the Chancellor for the Time being, preſently after ſuch Suggeſtions be untruly found, and proved untrue, ſhall have Power to ordain and award Damages according to his Diſcretion, to him who is ſo untruly troubled as aforeſaid, *&c.* which inſtead of Diminiſhing, increaſed the Power and Juriſdiction of this Court.

2. A Cauſe ſhall not be examined upon Equity in the Court of Requeſts, Chancery, or other Court of Equity, (*b*) after Judgment at the Common Law. 1 *Rol. Abr.* 381.

(*b*) The Reaſons given were, 1*ſt*, Becauſe it draws the Matter determinable by the Common Law *ad aliud examen*, *viz.* a Trial by Witneſſes. 2*dly*, After Judgment the Parties ought to be at Peace and Quiet; and if it ſhould be otherwiſe, every Plaintiff would begin in Equity, which would tend to the utter Subverſion of the Common Law. 3*dly*, A Court of Equity, being no Court of Record, cannot hold Plea of any Thing of which Judgment is given, which is a judicial Matter of Record. 3 *Inſt.* 123. But as the allowed Province of Equity is to correct and moderate the Rigour of the Law, and likewiſe to give Relief in Caſes for which human Wiſdom was not capable of providing poſitive Laws; ſurely it is but reaſonable that Equity ſhould have a Power of interpoſing after a Judgment at Law; eſpecially if it be conſidered how uncertain the Law is before it be determined; and as this Reaſoning has occaſioned the contrary Practice, which being now eſtabliſhed, it will be ſufficient only to mention the Authorities on this Head, *viz.* 4 *Inſt.* 36, 91. 3 *Inſt.* 123. *Dal.* 81. *Moor* 836. *pl.* 1129. 916. *pl.* 1300. 1 *Leon.* 241. 2 *Leon.* 115. 3 *Leon.* 18. 2 *Brownl.* 97. *Godb.* 244. 1 *Rol. Rep.* 71, 72, 252. 2 *Bulſt.* 194, 284. 3 *Bulſt.* 118, 120. *Lit. Rep.* 37. *Cro. Jac.* 335, 344. *March* 54, 83. *Cro. Car.* 595, 596. *Stile* 27. 1 *Sid.* 463. 1 *Mod.* 60. *Hard.* 23, 123. 2 *Bulſt.* 301, 302. 3 *Bulſt.* 115. 1 *Lev.* 241.

(*c*) Sequeſtrations were firſt introduced by Sir *Nicholas Bacon*, in Q. *Eliz.* Reign, before which, Chancery found ſome Difficulty in enforcing its Decrees; and for ſome Time after was controuled by the Common Law Courts. *Vide* 4 *Inſt.* 84. 1 *Rol. R.* 86. 3 *Bulſt.* 34. 1 *Rol. Rep.* 190. *Lit. Rep.* 166. L. *Egerton* impoſed a Fine on Sir *Tho. Themilthrop*, for not performing his Decree concerning Lands of Inheritance, and eſtreated the ſame into the Exchequer; but he was diſcharged of it; for otherwiſe, by a Mean he might bind the Intereſt of the Land when he had no Power. 4 *Inſt.* 84. So where the Lands of one *Waller* were extended by a Proceſs out of Chancery, and he brought his Aſſiſe in the Common Pleas, and was relieved. 4 *Inſt.* 84. A Perſon committed to the Fleet for not performing a Decree made ſubſequent and contrary to a Judgment at Law, was by *Habeas Corpus* out of the King's Bench admitted to Bail, and afterwards diſcharged. *Cro. Jac.* 341.

3. The Chancellor by a Decree cannot bind the Right of the (*c*) Land, but can only bind the Perſon; and if he will not obey it, the Chancellor may commit him to Priſon till he obeys it. 27 *H.* 8. 15.

(*d*) It has been held, that a Court of Equity could not decree againſt a Maxim of Law. 1 *Rol. Abr.* 376. And therefore it has been adjudged, that one Executor could not compel the other to Account. 1 *Rol. Rep.* 263. And that one Joint-Tenant could not ſue his Companion. 1 *Rol. Abr.* 376. And that if an Obligee loſt his Bond, he was without Remedy. 1 *Rol Abr.* 375. Where the Leſſor entred upon the Leſſee, and ſuſpended his Rent, it was held that he had no Remedy in Equity. *Lat.* 149. So where the Party became remedileſs by his own Act, as by paying Money without an Acquittance. 1 *Rol. Abr.* 374. So where one made a Promiſe for valuable Conſideration to make a Leaſe; and it was held that the Party could not ſue on this Promiſe in Equity, becauſe he might have an Action on the Caſe. 1 *Rol. Abr.* 380. But all theſe Reſolutions in the Common Law Courts have been long ſince exploded, and the conſtant Practice otherwiſe. *Boni Judicis eſt ampliare Juſtitiam.*

4. Three Things are to be (*d*) adjudged in a Court of Conſcience. 1*ſt*, all Covins, Frauds and Deceits, for which there is no Remedy by the ordinary Courſe of Law. 2*dly*, Accidents, as when a Servant, Obligor, or Mortgagor, is to pay Money on a certain Day, and they happen to be robbed in going to pay it, Relief is then to be had againſt the Forfeiture. 3*dly*, Breach of Truſt and Confidence. 4 *Inſt.* 84.

5. A Bill was brought for a Diſcovery againſt an Executor, and the Executor preſſed for a Diſmiſſion, becauſe the Plaintiff had the Effect of his Suit, *viz.* a Diſcovery; but *per Curiam*, as to a Diſmiſſion to Law, becauſe the Plaintiff hath a Diſcovery here, when this Court can determine the Matter, it ſhall not be a Hand-maid to other Courts, nor beget a Suit to be ended elſewhere; and therefore retained the Bill. *Mich.* 26 *Car.* 2. between *Barker* and *Dee*, 2 *Chan. Ca.* 200.

6. If *A.* ſues in Chancery for certain Lands, and (*e*) afterwards ſues in the Common Pleas for the ſame Lands, the Court of Chancery will grant an Injunction to ſtay his Proceedings in the Common Pleas till the Matter is heard in Chancery. *Cary* 71.

(*e*) The Practice is either to diſmiſs his Bill, or oblige him to make his Election.

7. If a Man has his Election to proceed at Law, or in Equity, and the Bill is for Land and mean Profits, he may elect to proceed in an Ejectment at Law for the Poſſeſſion; and in Equity, upon the Account; becauſe at Law he can recover Damages for the Meſne Profits, from the Time only of the Entry laid in the Declaration. 1 *Vern.* 105.

8. Equity will not ſuffer a Penalty to be demanded, if the Party will perform that for the Non-performance of which the Penalty is given. 2 *Chan. Ca.* 88.

9. Equity will not aſſiſt a Forfeiture. *Vide* 2 *Vern.* 127. When a Parſon brings a Bill for Tithes, he muſt wave the Forfeiture. 1 *Vern.* 60.

10. The Bill was at the Relation of ſeveral Freemen of the *Weavers* Company, againſt the Defendants and other Bailiffs, Wardens and Aſſiſtants of the ſaid Company, ſetting forth their Incorporation *tempore H.* 2. but that the Freemen being impoſed upon, and abuſed, by the governing Part of the Corporation, had a farther Charter and Rules granted them *tempore Car.* 1. but that the Defendants had been guilty of many Breaches and Violations of their Charters, and had oppreſſed the Freemen, *&c.* and mentioned ſome Particulars; and for a Diſcovery of the reſt, and that they might be decreed for the Future to obſerve the Charters, and to have an Account of the Revenue of the Corporation which the Defendants had miſ-ſpent, *&c.* was the End of the Bill; to which the Defendants demurred; becauſe as to Part of the Bill, it was to ſubject them to Proſecutions at Law, and to a *Quo Warranto:* And as to the other Parts, the Plaintiffs had Remedy by *Mandamus*, Information, or otherwiſe, and not here; and of the ſame Opinion was my L. *Keeper*, who ſaid it would uſurp too much on the King's Bench; and that he never heard of any Precedent for ſuch a Caſe as this, and ſo allowed the Demurrer. *Mich.* 1705. between the *Attorney General* and *Reynolds & al'.*

11. If a Truſtee does, by Fraud and Combination with the *Ceſtui que Truſt*, endeavour to evade any penal Law, as the Statute of Simony, *&c.* under Pretence that a Truſt is only cognizable in Equity, and that Equity ſhould not aſſiſt a Penalty or Forfeiture, yet Chancery will aid remedial Laws, and not ſuffer its own Notions to be made uſe of to elude any beneficial Law. *Paſch.* 1706. between the *Attorney General* and *Hindley.*

12. The Plaintiff brought her Bill to have an Account of the real and perſonal Eſtate of her late Husband, and to have Satisfaction thereout for Defect of Value of her Jointure-Lands, which he covenanted to be and to continue of ſuch Value: The Defendants inſiſted it was a Matter properly triable at Law, and ſhe ought to be ſent there to try it; for if ſhe were damnified, this Court could not aſſeſs Damages; but my L. Chancellor ſaid, the Maſter might enquire into it well enough; and therefore ſent it to him to examine and report,

and

and ſaid, if he found there were any Difficulties in it, he could ſend it to be tried afterwards. *Mich.* 1729. between *Hedges* and *Everard.*

13. A Deviſee of Lands being in Poſſeſſion of them, brings a Bill to prove the Will, and prays Relief; the Heir brings on the Cauſe *ad requiſitionem Def'tis*, and inſiſts the Bill ought to be diſmiſs'd, becauſe no Merit for a voluntary Deviſee, where no Debts or Legacies are to be paid, to have a Decree againſt the Heir; but the Maſter of the Rolls ſaid, it is the Buſineſs of this Court to quiet Poſſeſſions; and gave the Defendant a Year to try the Validity of the Will, and then to reſort back to the Court. *Hill.* 1702. between *Woodgate* and *Woodgate.*

14. The Plaintiff's Father married Sir *James Langham*'s only Daughter, and upon the Marriage Articles were entered into between the Defendant and the Plaintiff's Father, by which the Defendant covenants that he would, within ſix Months after the Marriage, pay the Plaintiff's Father 10000 *l.* and that his Executrix ſhould pay him 10000 *l.* within ſix Months after his Death; and the Plaintiff's Father covenanted to make the Wife a Jointure of 1500 *l.* but no Covenant for making any Settlement upon the Children: The Marriage took Effect, and the Defendant paid the 10000 *l.* and the Jointure was made, and both the Plaintiff's Father and Mother being dead, and the Defendant being grown very old, and having married a fourth Wife, the Plaintiff his Grandſon brought this Bill, pretending that the Defendant was grown very Weak in his Underſtanding, and wholly influenced by his Wife, and it was greatly feared would ſpend or make away his Eſtate, and not leave wherewithal to pay the 10000 *l.* at his Death; and therefore to have the Money paid preſently, the Defendant having an Allowance of the Intereſt, or at leaſt that he might give better Security to pay it when it became due, was the Bill: The Defendant ſwore by his Anſwer, that on the Marriage Treaty no other Security was inſiſted upon but the Covenant; and that if there was, he would not have conſented to it; and though it was inſiſted upon, that this was like the Caſe of Executors, who are every Day compelled to give Security for the Payment of Legacies payable at a future Day; yet my Lord Chancellor diſmiſs'd the Bill, and ſaid, that to do it here would be to alter the Terms of the Agreement; and that though this Court had Authority to compel Executors to give Security, yet it was becauſe they were conſidered as Truſtees for the Legatees; and no Agreement one way or other. *Hill.* 1698. between the Earl of *Warrington* and Sir *James Langham:* But upon an Appeal to the Houſe of Lords, the Matter was compromiſed.

15. The Plaintiff having recovered Judgment againſt *J. S.* (but no Writ of Execution ſued out) ſuppoſing ſome particular Effects of *J. S.*'s to be in the Defendant's Hands, brought a Bill to diſcover them, in order to ſubject them to his Judgment. The Defendant demurs, becauſe there is no Equity to compel ſuch a Diſcovery, and no ſuch Bill would lie againſt the Debtor himſelf, much leſs againſt a third Perſon. My L. *Keeper* ſeemed to agree it would not lie againſt the Debtor himſelf, nor to have a general Diſcovery from a third Perſon, but only for particular Things, as this Bill was; and over-ruled the Demurrer. *Mich.* 1705. between *Taylor* and *Hill.* Vide *Bills of Diſcovery*, Title *Bill.*

16. The Court of Chancery may, by a Bill in Equity, ſet aſide Letters Patent obtained by Fraud. *Attorney General* verſus *Vernon*, 1 *Vern.* 277.

17. If a Conveyance be gained indirectly, though it be by Deed and Fine, yet a Court of Equity can relieve againſt it: Reſolved *Mich.* 1693. between *Woodhouſe* and *Brayfield*, 2 *Vern.* 307.

18. A Bill was brought to have a Will ſet aſide, being obtained by Fraud and Circumvention; and my Lord Chancellor was clear of Opinion, that a Will may in Equity be ſet aſide for Fraud or Circumvention. *Mich.* 1700. between *Welby* and *Thornagh*.

19. But it has ſince been decreed in the Houſe of Lords, that a Will of a real Eſtate could not be ſet aſide in a Court of Equity for Fraud or Impoſition, but muſt firſt be tried at Law on *deviſavit vel non*, being Matter proper for a Jury to inquire into. *July* the 28*th*, 1728. between *Bramsby* and *Kerridge*.

## (C) Concerning the Jurisdiction of Chancery in Foreign Parts.

1. IF there are two Jointenants of Lands which lie in *Ireland*, and one of them prefers a Bill for an Account of the Profits, and for a Partition of the Lands, the Bill will be good as to the Profits which are in the Perſonalty, but not ſo as to the Partition which is in the Realty; for a Commiſſion to make Partition cannot be awarded into *Ireland*. *Hill.* 27 *Car.* 2. between *Cartwright* and *Pettus*, 2 *Chan. Ca.* 214.

2. *A.* obtains an Annuity or Rent-charge, charged on certain Lands of *B.*'s in *Ireland*, *B.* ſuggeſting ſome fraudulent Prrctice here in *London*, *in obtaining it*, exhibited his Bill againſt *A.* being here to be relieved; *A.* pleaded to the Juriſdiction of the Court, the Land lying in *Ireland*; but the Plea was over-ruled, and he was ordered to pay Coſts for endeavouring to ouſt the Court of its Juriſdiction; *per Nottingham*, L.C. *Mich.* 1682. between the Earl of *Arglaſſe* and *Muſchamp*, 1 *Vern.* 77. 1 *Vern.* 135. *S.C.* and the former Reſolution affirmed by *North*, L.K. upon a Re-hearing; who ſaid, that the Objection that the Court could not ſequeſter the Lands in *Ireland* was of little Weight, for that it did not appear but that the Defendant had other Lands in *England*, which would be ſubject to a Sequeſtration.

3. So where a Bill was exhibited againſt *A.* to anſwer a Contract made of Lands that lay in *Ireland*; and though the Lands lay in *Ireland*, and the Title was under the Act of Settlement there, yet a *Ne exeat Regnum* was granted, and Proceſs againſt him to anſwer; and when he afterwards went into *Ireland* without anſwering, he was ſent for by ſpecial Order from the King, and made to anſwer the Contempts, and to abide the Juſtice of the Court. Between *Archer* and *Preſton*, and cited by the L. C. 1 *Vern.* 77.

4. If a Truſtee lives in *England*, the Chancery here may decree the Truſt, tho' the Lands lie in *Ireland*; although it was objected, 1*ſt*, That in this Caſe there had been two Judgments in the Courts of Law in *Ireland*, and three Bills in Equity. 2*dly*, That the Truſtee came here occaſionally, and that it would be unreaſonable to keep him from his Concerns to attend this Suit. 3*dly*, That the Caſe ariſes upon Facts properly triable in *Ireland*, *viz.* Whether *Ceſtui*

*que Truſt* were the ſame Perſon who died in Rebellion, which was twice tried before in *Ireland*, and found againſt the Plaintiff. 4*thly*, That this Caſe depends on the Conſtruction of the Act of Settlement in *Ireland*. But theſe Objections were over-ruled, the Proof being full as to the Identity of the Perſon; two Chief Juſtices concur with my Lord Chancellor, that the Judges here were proper Expoſitors of the *Iriſh* Laws. *Mich.* 1686. between the Earl of *Kildare* and Sir *Morrice Euſtace* and *Fitzgerald*, 1 *Vern.* 419.

5. The Bill was, that the Defendant might redeem a Mortgage of the Iſland of *Sarke*, or be foreclоſed; the Defendant pleaded to the Juriſdiction of the Court, that the Iſland was Part of the Dutchy of *Normandy*, and had Laws of their own, and were under the Juriſdiction of the Courts of *Guernſey*; but the Plea was over-ruled, becauſe the Mortgage was of the whole Iſland, and for that the Defendant was ſerved here; for *Æquitas agit in Perſonam. Paſch.* 1705. between *Toller* and *Carteret*, 1 *Vern.* 494. *vide* 1 *Chan. Ca.* 221. where it is ſaid by Serj. *Maynard*, that Court could not by Decree bind the *Iſle of Man*, it being out of the Power of any Sheriff.

## (D) Concerning the Juriſdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.

1. IF a Cauſe has been heard in the Exchequer, and two ſeveral Trials directed, *viz. Will or no Will*, and in both a Verdict is for the Plaintiff; and yet the Court diſmiſſeth the Bill, but without Prejudice in Law or Equity; the Plaintiff by an original Bill in Chancery may have Relief for thoſe Matters. 1 *Chan. Ca.* 155.

2. A Bill was exhibited in Chancery concerning Tithes and Bounds of a Pariſh, which proceeded to Anſwer and Replication; then the Plaintiff exhibited another Bill in the Exchequer, and his Witneſſes were examined, and now proceeds again in Chancery, and replies; the Defendant pleaded the Proceedings and Examination in the Exchequer, and ruled good, as to the Examination of the ſame Matters, which being examined to there, were not to be examined in Chancery. 1 *Chan. Ca.* 233.

3. A Mortgagee brought a Bill in the Exchequer to foreclоſe; the Mortgagor exhibited a Bill in Chancery to redeem, to which the Mortgagee pleaded the former Bill depending in the Exchequer; and the Plea was over-ruled, tho' it was urged, that if the Deputy Remembrancer ſhould take the Account one Way, and a Maſter here ſhould take it another, it would breed Confuſion; and that if this Court ſhould be of Opinion, that there ought to be no Redemption, and the Exchequer ſhould decree a Redemption, the Juriſdictions would claſh: But *per Lord Chancellor*, the Exchequer, tho' an antient Court of Equity, yet is but a private Court, and its Juriſdiction for getting in the King's Revenue; and if there ſhould happen any of the Inconveniencies mentioned, there are ſeveral Precedents, that Injunctions have gone to the Exchequer in ſuch Caſes. *Hill.* 1683. between the Earl of *Newbourgh* and *Wren*, 1 *Vern.* 220.

4. A Decree was obtained in the Exchequer againſt two of the Inhabitants of *Bridgenorth*, to eſtabliſh a Cuſtom for all the Inhabitants there, to grind at the King's Mills; and this Decree was had without any Trial, and afterwards affirmed in the Houſe of Peers; and now this Bill was brought in Chancery by other Inhabitants of *Bridgenorth*, to prevent Multiplicity of Suits, and to examine Witneſſes *in perpetuam rei memoriam*, and to diſcover Evidences in the Defendant's Hands; and in the Bill they deny that there is any ſuch Cuſtom for Grinding, *&c.* and alledge, that the former Decree in the Exchequer was obtained by Colluſion, and that the Defendants would not bring any Actions at Law, till the Plaintiff's Witneſſes were dead; and they likewiſe pray a Diſcovery, whether the Inhabitants in new Foundations as well as old are obliged to grind at the King's Mills. To this Bill the Defendants pleaded the former Decree in the Exchequer, and Affirmance in the Houſe of Peers in Bar, and alſo demurred to the Bill, but had not, as was affirmed, denied the Colluſion charged by the Bill. And the Court held, that the Tenor of the Bill was directly to queſtion the Juſtice of the former Decree, and that the Charge of Colluſion need not be anſwered, being only inſerted to give the Court Juriſdiction; and if there was any Redreſs, it muſt be by Application to the Houſe of Peers. *Mich.* 1699. between *Jay & al'* and *Braine*.

5. The Plaintiffs, as Aſſignees under a Statute of Bankruptcy, pray an Account of the Eſtate of *Hind* the Bankrupt, ſeiſed by the Defendants, on Pretence of Debts owing to the King, by Virtue of ſeveral *Extents* ſued out for that Purpoſe, *viz.* one original *Extent* for the King, and two other Extents in Aid by the Defendants, who were Farmers of the Exciſe; it being objected that this Matter was properly cognizable in the Court of Exchequer, which was the King's Court of Revenue; and that this Court would not examine what was the *Quantum* of the Debt due to the King, or how far the Extents were neceſſary: The Lord *Keeper* allowed the Objection, and diſmiſſed the Bill; and as to the Precedents which had been produced, where this Court had held Plea in like Caſes; he ſaid they did not come up to this Caſe, for in the Caſe of (*a*) *Capel* and *Brewer*, the Defendant who ſued the Extent in Aid, confeſſed by Anſwer he had ſufficient of his own Eſtate to pay the King's Debt; and in the Caſe of *Cholmly* and *Sturt*, it appeared to be a fraudulent Contrivance by an Extent in Aid, to gain a Preference to a Debt of an inferior Nature. *Paſch.* 1701. between *Brown* and *Trant*, 2 *Vern.* 426.

(*a*) 1 *Vern.* 469.

## (E) How far Chancery will exert a Juriſdiction in Matters cognizable in inferior Courts, as the Eccleſiaſtical Courts, Univerſity Courts, Cheſter, Durham, &c.

1. IF *A.* and *B.* are made Executors, and both prove the Will, but *A.* only acts as Executor, and dies, leaving his Wife Executrix, and a Legatee ſues *B.* in the Spiritual Court, he being liable there by his Joining in the Probate of the Will; yet *per* Lord *Keeper*, the Judgments of the Eccleſiaſtical Courts are as well ſubject to the Equity

quity of this Court as the Judgments at Law; and he inclined to give Relief in this Caſe, the Party being without Remedy by Appeal, for the Delegates are to judge according to the Eccleſiaſtical Laws. *Paſch.* 23 *Car.* 2. between *Vanbrough* and *Cock*, 1 *Chan. Ca.* 200.

2. If an Infant Legatee ſueth in the Eccleſiaſtical Court, and afterwards in Chancery, the Suit depending in the Eccleſiaſtical Court cannot be pleaded in Bar, for there is no ſuch Security for the Infant's Advantage as here, eſpecially as to Intereſt and bringing in an Account. *Hill.* 33 *Car.* 2. between *Howel* and *Waldron*, 2 *Chan. Ca.* 85.

3. A Bill was brought to have Diſtribution of an Inteſtate's Eſtate, according to the Statute 22 *Car.* 2. to which the Defendant pleaded, that the Ordinary is made Judge, and appointed to take Security, and that the Plaintiff ought not to ſue here; but the Lord *Chancellor* over-ruled the Plea. *Paſch.* 34 *Car.* 1. between *Pamplin* and *Green*, 2 *Chan. Ca.* 95. 2 *Vent.* 362. *S. P.*

4. The Widow in the Spiritual Court ſet up a Procurator for her Children, the Infants, and gets her Account paſſed there, and each Child's Proportion aſcertained there, and Diſtribution decreed; and on giving new Security, got the old Security diſcharged; but the Court, without Regard to the Proceedings in the Spiritual Court, decreed an Account of the whole Eſtate. *Paſch.* 1688. between *Biſſell* and *Axtell*, 2 *Vern.* 47.

5. If there be Fraud in obtaining a Will relating only to a Perſonal Eſtate, let the Fraud be ever ſo apparent; yet it is not examinable in Chancery after the Will is proved in the Spiritual Court, and ſo long as that Probate is in Force. Between *Archer* and *Moſſe*, 2 *Vern.* 8.

6. A Will of a Perſonal Eſtate obtained by Fraud, and by getting the Party to ſwear, that it ſhould not be revoked; yet after Probate in the Spiritual Court is not to be controvered in Equity; but if a Party claiming under ſuch Will comes for any Aid into Equity, he ſhall not have it. Between *Nelſon* and *Oldfield*, 2 *Vern.* 76.

7. If the Plaintiff exhibits his Bill to be relieved touching ſome Lands in *Cornwall*, and the Defendant being *Head* of *Exeter College* in *Oxford*, pleads the Privilege of the Univerſity of *Oxford*, and that he ought to be ſued in the *Vice-Chancellor*'s Court in *Oxford* only, his Plea will be over-ruled; for Matters of Freehold are excepted out of their Charter; and their Court can, at beſt, have but a lame Juriſdiction as to Lands in *Cornwall*. *Hill.* 36 *Car.* 2. between *Stephens* and Dr. *Berry*, 1 *Vern.* 212.

8. The Plaintiff ſets forth in his Bill a Contract under Seal with the Defendant, for making a Leaſe of certain Lands in *Middleſex*, and prays an Execution of the Agreement; to which the Defendant pleaded, that he was Head of a College in *Oxford*, and ſets forth the Charters of, *&c.* impowering the Univerſity to inquire and proceed in all Pleas and Quarrels in Law and Equity, *&c.* and concluded to the Juriſdiction of the Court; but the Plea was over-ruled; 1*ſt*, Becauſe the Charter ought properly to be extended to Matters at Common Law only, or to Proceedings in Equity which might ariſe in ſuch Caſes, and not to meer Matters of Equity, which are originally ſuch, as to execute Agreements *in Specie*. 2*dly*, Conuzance of Pleas is never to be allowed, unleſs the inferior Juriſdiction can give Re-

medy; here they can only excommunicate or impriſon, but cannot proceed to Sequeſtration of the Lands in *Middleſex*. *Hill.* 36 *Car.* 2. between *Draper* and Dr. *Crowther*, 2 *Vent.* 362.

9. A Claim of Privilege cannot be put in by Writing, but it muſt be by Way of Plea, but it need not be on Oath. 1 *Chan. Ca.* 237. the Privilege of any inferiour Court cannot be objected to at hearing, but muſt be pleaded. 2 *Vern.* 484.

10. A Man cannot ſue in the Chancery of *Cheſter* for a Thing which in Intereſt concerns the Chancellor there, becauſe he cannot be his own Judge, and therefore he may in this Caſe ſue in the Chancery of *England*; otherwiſe there would be a Failure of Right. Between Sir *John Egerton* and *Lord Derby*, 12 *Co.* 113.

11. If a Man hath Cauſe to complain in Equity of a Matter ariſing within the County Palatine of *Cheſter*; if the Defendant lives out of the County Palatine, he may be ſued in the Chancery here, or otherwiſe there would be a Failure of Juſtice; for Proceedings in Equity, binding the Perſon only, if the Perſon lives out of the Juriſdiction of the Chamberlain of *Cheſter*, there can be no Relief there. 12 *Co.* 113.

12. A Bill was exhibited to have an Account of the Profits of Lands which the Defendant had received on Truſt for the Plaintiff during his Minority, and for Money received on Bonds belonging to the Plaintiff, and for Writings, *&c.* the Defendant pleaded, that the Lands lay in *Cheſhire*, and that he lived in *Cheſhire* in the County Palatine of *Cheſter*, and therefore not within the Juriſdiction of this Court; and though Precedents were ordered to be ſearched, and on View of them a *Maſter* certified, that the Privilege of the Counties *Palatine* was allowable between Parties dwelling in the ſame County, and for Lands there; yet the Plea was overruled. *Hill.* 14 *Car.* 2. between *Edgworth* and *Davies*, 1 *Chanc. Ca.* 40.

# CAP. XXII.

# Creditor and Debtor.

(A) Where there is a Provision by Deed or Will for Payment of Debts, what Debts shall be paid.

(B) The Order and Manner in which Debts shall be paid, or what Precedence one Kind of Debt shall have over another in Equity.

(C) What shall be a good Payment, to whom, and at what Time.

(D) Where Debts of a different Nature are due, and a general Payment is made, to which Debt shall it be applied.

(E) What Conveyance or Diſpoſition ſhall be fraudulent as to Creditors.

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## (A) Where there is a Proviſion by Deed or Will for Payment of Debts, what Debts ſhall be paid.

1. IF *A.* makes a Deed of Truſt of Lands for Payment of his Debts, to take Effect after his Death, and the Words of the Deed are, *Monies owing by him*, and a Schedule is annexed to the Deed, wherein Mention is made of 1000 *l.* to *A.* and 500 *l.* owing to *B.* and then there is this *Item*, *viz. The Sum of* 3000 *l. owing to other Perſons*; this Deed ſhall not be conſtrued to charge the Lands with Debts contracted afterwards, tho' they exceed not the Sum mentioned in the Schedule. Decreed *Hill.* 1681. between *Purefoy* and *Purefoy*, 1 *Vern.* 28.

2. *A.* had a Demand of 500 *l.* againſt *B.* and had run it up to 2700 *l.* and obtained a Decree for it in Chancery, from which *B.* appealed to the *Houſe of Lords*, where the Decree was affirmed: It was obſerved, that *B.* at the pronouncing this Decree in the Houſe of Lords, fell down in a Swoon, and within a Week afterwards died, as ſuppoſed, of Grief; but he firſt got a Petition anſwered, for

a Rehearing, and in his Sickneſs deviſed all his Lands for the Payment of his Debts; and my Lord Keeper ſaid, that this could not be intended a Proviſion for *A.*'s Demand, which he denied upon Oath, and in which he died a Martyr; however, at length decreed, that after all Debts upon ſimple Contract were paid, *A.* ſhould come in and be paid his Debt, if he could find Aſſets. *Hill.* 1682. between *Norden* and *Norden*, 1 *Vern.* 142. 1 *Vern.* 431. *S. C.* cited, and ſaid to be adjudged by my Lord Keeper *North*, not to lie within the Intent of the Proviſion for Payment of the Teſtator's Debts.

3. A Man deviſed his Lands for the Payment of his Juſt Debts; the Teſtator, whilſt a Student at *Cambridge*, (but of Age) had by Surprize, been prevailed upon to give a Covenant for Payment of a Portion to his Siſter; but he afterwards conteſted this Debt; and though he was decreed to levy a Fine to ſubject Lands for the Payment of it, yet he refuſed ſo to do: *Per Curiam*, this being a juſt Debt ſhall be paid, though perhaps not within the Intent of the Proviſion. Decreed *Hill.* 1686. between Lord *Hollis* and Lady *Car*, 1 *Vern.* 431.

4. If one by Will or Deed ſubject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations ſhall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extinguiſhed that, tho' it hath taken away the Remedy. 1 *Salk.* 154. 2 *Vern.* 141. *S. P.* decreed.

5. A Man borrows a Sum of Money on the Mortgage of a Ship, and covenants, that whatever Money the Mortgagee ſhould advance for Inſurance of the Ship in a Voyage ſhe was then about to make, that he would repay it; but there was no Covenant for Repayment of the Principal Money it ſelf; the Mortgagee inſures the Ship, and the Mortgagor repaid him that Money; then the Ship proceeds on her Voyage, and returns home; and being afterwards to go out on another Voyage, the Mortgagee treated with a Perſon concerning the Inſurance, but could not agree for the Rate, and thereupon the Ship went out and was loſt in the Voyage; and now between the Mortgagee and the Executors of the Mortgagor, the Queſtion was, whether the Mortgagee ſhould come in for his Principal Money as a Creditor by ſimple Contract; and it was argued that he ought not, becauſe there was no Covenant for Payment of the Mortgage-Money, ſo that he muſt be ſuppoſed to reſt himſelf on the Ship only for his Security, and that being loſt, ſo is his Money too; but on the other Side it was urged, that if he had taken no Security at all for his Money, he had then, without Queſtion, been a Creditor by ſimple Contract; and ſurely the Taking Security ought not to put him in a worſe Condition, eſpecially now that the Security being loſt and gone, his Debt reſts wholly on the ſimple Contract; and of the ſame Opinion was my Lord *Chancellor Harcourt*, and pronounced his Decree accordingly 1713. between *Thomas* and *Terrey*.

6. If a Man ſeiſed in Tail of Lands, of which there is a Term in Truſtees to attend the Inheritance, levies a Fine, and by Deed ſubjects the Land to a Debt of 1000 *l.* but declares, that after the Debt paid, the Land ſhould be to the old Uſes, and after deviſes the Land for Payment of all his Debts, the Lands ſhall be liable to all his Debts in general. Decreed *Mich.* 1682. between *Turner* and *Gwynne*, 1 *Vern.* 99, 100. but the Reporter makes a *Quære*, for it ſeems he was but Tenant in Tail of the Inheritance, and ſo could not charge it by

by his Will, unleſs it be intended he had ſtill a Power of doing it lodged in him, by Reaſon of the Fine, notwithſtanding he had declared that after the Payment of the 1000 *l.* it ſhould go to the former Uſes.

7. On the Marriage of the Plaintiff with *Edward*, Earl of *Warwick*, in 1696. previous thereto a Settlement was made by the *Earl* to the Uſe of two Truſtees, for ninety-nine Years, if the *Earl* and *Counteſs* ſhould ſo long jointly live, in Truſt, out of the Rents and Profits to pay to the *Counteſs*, for her ſeparate and Perſonal Uſe, by Way of Pin-money, 400 *l. per Ann.* quarterly, and ſubject thereto that and the Reſt of the Eſtate was to the Earl for Life; Remainder as to Part to the Counteſs for Life for her Jointure; Remainder of the Whole, as the ſaid Eſtates ſhould determine, to the Uſe of the Firſt and other Sons of that Marriage ſucceſſively in Tail Male, with Remainder in Fee to the *Earl*; the Marriage takes Effect, and *July* 1701, the Earl being taken ill makes his Will, whereby he charges, as far as he was able, all his Real Eſtate with the Payment of his Debts, and ſoon after dies, leaving only one Child, *Edward-Henry*, then *Earl* of *Warwick*. At the Time of his Death there was a Year and three Quarters of the Pin-money in Arrear, and he was likewiſe indebted to ſeveral other Perſons in conſiderable Sums of Money, which his Perſonal Eſtate would not extend to pay and ſatisfy; and there being no Executor named in the Will, the Lady *Eliz. Rich*, his Siſter, as Principal Creditor, took out Adminiſtration to him, with the Will annexed; and nothing but the Reverſion in Fee of the whole ſettled Eſtate being in his Power to charge with the Payment of his Debts, this Reverſion could not be affected or ſold, during the Continuance of the Eſtate-tail, as it was liable to be docked by a Recovery by the Tenant in Tail; *Earl Edward-Henry* attained his Age of twenty-one Years in 1719, and ſoon after levied a Fine to the Uſe of himſelf and his Heirs, and in 1721. died without Iſſue Inteſtate and unmarried; and upon his Death the Eſtate deſcended to the Defendant; and the Plaintiff the Counteſs, his Mother, took out Letters of Adminiſtration to the ſaid *Earl Edward-Henry*; and now this Bill was brought by the Counteſs for a Satisfaction of the ſaid Arrears of Pin-money, and by the other Creditors of *Earl Edward*, for a Satisfaction of their Debts; and in order thereto, for an Account of the Real and Perſonal Eſtate of *Earl Edward*; and that if the Perſonal Eſtate were not ſufficient, that the ſame might be paid out of the Real Eſtate, which now, by the Failure of Iſſue Male, was become Aſſets, according to the Will of *Earl Edward*. It was inſiſted upon, for the Defendant, that the *Earl* and *Counteſs* living together, and no Demand being proved to be made of theſe Arrears of Pin-money, that it was in the Nature of a Preſent of them to the Earl, or a Waiver of them, and that at moſt in ſuch Caſes, the Court never allowed more than a Year's Arrear; becauſe it was impoſſible, but that at the Husband's Death ſome Arrears muſt be, unleſs they were always paid punctually at the Day, and therefore a Year has been always held to be as much as was reaſonable to allow in thoſe Caſes; but in this Caſe the Court allowed the Whole, as the Whole were proved to be in Arrear; and that between Husband and Wife, who lived well together, three Quarters of a Year made but little Difference. Another Point inſiſted upon for the Defendant was, that by the Fine levied by *Earl Edward-Henry*, the Eſtate-

tail was extinguiſhed or conſolidated with the Reverſion or Remainder in Fee in him, and that the Plaintiffs Title to demand their Debts then attached upon the Eſtate, and cited 1 *Salk.* 333. *Symonds* and *Scudmore*; and therefore, that the Rents and Profits received by *Earl Edward-Henry*, ought to be applied towards a Satisfaction of the Plaintiff's Demands; and by Conſequence that the Plaintiff, the *Counteſs*, being Adminiſtratrix to the ſaid *Earl*, had Aſſets in her own Hands for that Purpoſe: But the Court was clear of Opinion, that the Rents and Profits received by *Earl Edward-Henry* of his own Eſtate, whereof he was then Owner, ſhould not be applicable for that Purpoſe before a Demand made, becauſe till then he did no Wrong in receiving the Rents and Profits of his own Eſtate; and ſo it had been decreed lately in the Caſe of *Montague* and *Bord* in this Court. *Mich.* 1728. between the *Counteſs of Warwick* and *Edwards*.

## (B) The Order and Manner in which Debts ſhall be paid, or what Precedence one Kind of Debt ſhall have over another in Equity.

1. IF Lands are deviſed to Truſtees for Payment of Debts; Debts by ſimple Contract, and Debts by Specialty, ſhall be paid in Proportion; and though the Truſtees are Creditors to the Teſtator, or Sureties for him, yet they ſhall not be allowed to prefer themſelves. 2 *Chanc. Ca.* 54. That all Debts, when the Deviſe is to a Truſtee, ſhall be paid in Average, except thoſe that affect the Land. Decreed. *Vid.* 1 *Vern.* 63.

2. But if the Lands are deviſed to an (*a*) Executor, they become legal Aſſets, and ſhall be paid in a Courſe of Adminiſtration; and according to the Precedency or Superiority at Law. Decreed *Mich.* 1682. between *Girling* and *Lee*, 1 *Vern.* 63. 2 *Chanc. Rep.* 262. *S. C.* 1 *Chanc. Ca.* 248. 1 *Roll. Abr.* 920. *Hob.* 265.

(*a*) That they become legal Aſſets in the Hands of an Executor, Reſolved

3. If one deviſes Lands to his *Nephew*, and his Heirs, whom he makes his Executor in Truſt to ſell, for Payment of Debts and Legacies, the Debts and Legacies ſhall be paid in Average; for he having deviſed to him and his Heirs, ſhews that he deſigned, that it ſhould go in a Courſe of Deſcent; and he to take as a Truſtee. 2 *Vern.* 133. But *Q.* whether the Debts ſhould not be preferred; and *vid.* 2 *Vern.* 248. the Caſe of Sir *John Bowles* cited; where, upon a Truſt for Payment of Debts and Legacies, tho' it was decreed by my Lord Keeper *Bridgman*, that they ſhould be paid *Pari Paſſu*, and each to bear the Loſs in Average; yet my Lord *Nottingham* reverſed the Decree, and ordered the Debts to be firſt paid; and ſaid he would not let a Man ſin in his Grave. *Note*; *This has ſince been the conſtant Practice with Reſpect to Debts and Legacies*; *but as to Creditors, they ſhall be all paid in Average, except ſuch whoſe Debts affect the Land.* Vid. 2 Vern. 405.

4. If on the Eſtate of *J. S.* there are ſeveral Mortgages, Judgments and Statutes; and he likewiſe owes ſeveral Debts by Bond and ſimple Contract, and ſome Parts of his Eſtate are mortgaged no leſs

than thrice over; and in this Manner, *viz.* to *A.* there is a ſubſequent Mortgage of Lands, on which *B.* had a prior Mortgage of a Moiety of the Lands contained in *A.*'s Mortgage, and alſo of ſeveral other Parcels of Land: *C.* has a prior Mortgage of the other Moiety of the Lands compriſed in *A.*'s Mortgage, and alſo of ſeveral other Lands; and *J. S.* having ſubjected his Eſtate for the Payment of his Debts, it was held by my Lord Chancellor, that to avoid Confuſion, the ſubſequent Mortgagees having a Right to redeem, the real Securities ſhould be firſt paid, and then the Bonds and ſimple Contract Debts in Average; altho' it was urged, that the Subſequent Mortgages, *&c.* ſhould be paid in Average with the Bond and ſimple Contract Creditors, their Securities not affecting the Lands, the legal Eſtate being in the firſt Mortgagee. It being likewiſe urged, that a Judgment-Creditor ſhould have Satisfaction before a ſecond Mortgagee, as at (*b*) Law, my Lord Chancellor thought it reaſonable; but for the above Reaſons left him to get it at Law, if he could. Decreed *Mich.* 1682. between *Child* and *Stephens*, 1 *Vern.* 101.

(*b*) An Executor ſhall diſcharge a ſubſequent Judgment before a prior

Statute, becauſe of the Notoriety of it. 4 *Co.* 59. but if the Statute be extended, whether the Judgment-Creditor may enter on the Conuſee, *Q.* and *vid.* 2 *And.* 157. *Cro. Eliz.* 734, 822.

5. It was decreed at the *Rolls*, that Mortgages were to be paid in the firſt place, and then Judgments, and then Recognizances, *&c.* but upon an Appeal to the Houſe of *Lords*, it was adjudged, that Mortgages were not to be preferred to other real Incumbrances; but that Mortgages, Judgments, Statutes and Recognizances ſhould take Place, according to their Priority, and as they ſtood in Order of Time. *Mich.* 1705. between the Earl of *Briſtol & al'* and *Hungerford*, 2 *Vern.* 524.

6. If Creditors have joined in a Bill, and obtained a Decree for Payment of their Debts out of legal and equitable Aſſets, none of them ſhall be permitted to obtain a Preference of the others, by obtaining Judgments againſt the Executors; and *per* Lord *Keeper*, where there are legal and alſo equitable Aſſets, the Creditors who will take their Satisfaction out of the legal Aſſets, ſhall have no Benefit of the equitable Aſſets, until the other Creditors, who can only be paid out of thoſe Aſſets, have thereout received an equal Proportion of their reſpective Debts. Decreed *Paſch.* 1702. between *Sheppard* and *Kent*, 2 *Vern.* 435.

7. If the Teſtator ſeiſed in Fee enters into a Statute, and deviſes a Legacy of 500 *l.* and the Conuſee takes all the Perſonal Eſtate in Execution, ſo that nothing is left to pay the Legacy, Equity will decree the Real Eſtate to ſtand charged with the Legacy. 2 *Chanc. Ca.* 4. 2 *Chanc. Ca.* 117. *S. P.* decreed.

8. If there is a Debt owing to the King, Equity will order it to be paid out of the Real Eſtate, that other Creditors may have Satisfaction of their Debts out of the Perſonal Aſſets. 1 *Vern.* 455.

9. One died, leaving a Debt by Judgment, and another due by Bond, and the Judgment-Creditor being at a good Underſtanding with the Heir, levied his Debt out of the Perſonal Eſtate; and *Hutchins*, Lord Commiſſioner, inclined to relieve the Bond-Creditor, and that he ſhould ſtand in the Place of the Judgment-Creditor, and charge the Land with his Debt; for as the Heir has often the Aſſiſtance of a Court of Equity, in having the Perſonal Aſſets applied in

Eaſe of the Real Eſtate; it is but reaſonable that he ſhould do Equity to others: But the Reporter refers to the Order. 2 *Vern.* 182.

10. If one dies indebted by Mortgage and ſimple Contract, and the Executor applies the Perſonal Aſſets in Diſcharge of the Mortgage, the ſimple Contract Creditor ſhall ſtand in the Place of the Mortgagee, and tho' one of them gets Judgment of Aſſets *cum acciderent*; yet as their Relief is only in Equity, they ſhall be paid in Average. Decreed *Mich.* 1718. between *Willſon* and *Fielding*, 2 *Vern.* 763.

11. But where *H.* ſeiſed in Fee, and indebted by Bonds, by Will gives Legacies to his Children (whom he had otherwiſe provided for before) and deviſes his Lands to his eldeſt Son in Tail; and he being alſo made Executor, he pays the Bonds with the Perſonal Eſtate; and the Legatees brought a Bill to come againſt the Real Eſtate in the Place of the Bond-Creditors; the Court ſeemed to admit, that if the Lands had deſcended, the Legatees might have been relieved in this Manner; but ſince the Teſtator had deviſed them, it was reſolved, that they ought to be exempted; for it was as much the Teſtator's Intention, that the Deviſee ſhould have the Land, as the others ſhould have their Legacies; and a ſpecifick Legacy is never broke into, in order to make good a pecuniary One; and the Children being otherwiſe provided for, are not in the Nature of Creditors. *Per Harcourt* Lord Chancellor, upon an Appeal from a Decree of the Maſter of the Rolls, who held, that the Real and Perſonal Eſtate ſhould be charged, that both the Debts and Legacies might be paid. Between *Hern* and *Meric*, 2 *Salk.* 416.

12. If Lands are deviſed in Truſt, to pay Mortgages in the firſt place, and then Legacies; and the Truſtee is made Executor, who mortgages the Lands to pay other Debts, the laſt Mortgage ſhall be paid before the Legacies. 1 *Vern.* 69.

13. The Husband, in Conſideration of his Wife's Joining with him in a Fine, and parting with her Jointure of 40 *l. per Ann.* gives her Truſtee a Bond to ſettle other Lands of 40 *l. per Ann.* on the Wife for Life, Remainder to the Heirs of her Body; the Husband being indebted in other Bonds dies Inteſtate, and the Wife takes Adminiſtration, and confeſſes Judgment to her Truſtee, on a Bill by another Bond-Creditor. Decreed the Wife's Bond, as to herſelf only, to be performed before the Plaintiff is paid; but the Children to have no Benefit of this Bond preferable to the other Bond-Creditors. Between *Cottle* and *Fripp*, 2 *Vern.* 220.

14. If *A.* purchaſes Lands of *B.* and mortgages back theſe Lands for Part of the Purchaſe-money, and gives a Note to *B.* for 200 *l.* the other Part thereof, and *A.* deviſes theſe Lands to be ſold for Payment of his Debts; this 200 *l.* Note, tho' for Part of the Purchaſe-money, ſhall not be preferred to other Debts, nor be a Charge on the Lands in Equity. *Mich.* 1692. between *Bond* and *Kent*, 2 *Vern.* 287.

15. If a Freeman of *London* gives a voluntary Judgment, payable three Months after his Death, it ſhall be poſtponed to Debts by ſimple Contract, and to the Widow's cuſtomary Part; but will bind the Freeman's Legatory Part. Between *Fairbeard* and *Bowers*, 2 *Vern.* 202.

16. A voluntary Bond ſhall not, in a Courſe of Adminiſtration, take Place of Real Debts, tho' by ſimple Contract, but ſhall, notwithſtanding,

withſtanding, be paid before Legacies. Decreed *per* Lord *Harcourt* between *Jones* and *Powell.*

17. If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt muſt be conſidered here only as a Debt due on ſimple Contract. 2 *Vern.* 540.

18. The Arrears of Rent incurred in the Life-time of the Teſtator, ſhall be paid before Bond-Debts, tho' reſerved on a Parol Leaſe. 1 *Vern.* 490.

19. If *J. S.* deviſes his Lands for the Payment of Mortgages, Judgments and Recognizances that affected the Land, and then other Debts, and there is a Recognizance not inrolled, it ſhall be taken but as an Obligation, and be paid as a Debt by Specialty. 2 *Vern.* 750.

20. So where a Recognizance being inrolled by ſpecial Order of the Court, after the Time for inrolling of it was elapſed; and the Conuſor betwixt the Date of the Recognizance and the Inrolling of it, borrowed Money of *J. S.* upon a Judgment, which was now over-reached by the Recognizance; and the Eſtate of the Conuſor being in Mortgage prior to the Recognizance, ſo that neither the Recognizance nor Judgment could reach the Eſtate without the Aid of Equity; and the Court inclined to give the Preference to the Judgment-Creditor. 2 *Vern.* 234. *vid.* 2 *Vern.* 272. that Bond-Debts and Debts aſcertained ſhall be preferred to Debts which only ſound in Damages.

21. *T. S.* entred into a Bond, wherein he bound himſelf and his Heirs to pay 100 *l.* within ſix Months after his Death, and became indebted to the Plaintiff *Neave* in 45 *l.* by ſimple Contract, and died inteſtate, not leaving perſonal Aſſets ſufficient to pay his Debts; the Defendant was his Son and Heir, and had real Aſſets from him by Deſcent of the Value of 100 *l.* and he took out Adminiſtration to his Father; and ſix Days before the 100 *l.* became due, by the Condition of the Bond agrees with the Obligee to convey the Freehold Lands deſcended to him in Satisfaction of the Bond, and the Conveyances were drawn and ingroſſed accordingly; but before the Execution of them, he gives the Obligee thirty Shillings to have the Conſideration of the Deed razed, and made to be for ſo much Money paid inſtead of the Delivery up of the Bond; but no Money was paid, but only the Bond delivered up; *Neave* the Plaintiff demanding his Debt, he inſiſted he had paid the Bond out of the perſonal Aſſets, and had none left to pay him; whereupon he brought this Bill, and the Defendant inſiſted, that he being both Heir and Adminiſtrator had a Liberty to pay the Debt out of what Aſſets he pleaſed; that he had not paid the Bond out of the real Aſſets, nor ever intended ſo to do. But upon the whole Matter the Court declared the Bond to be well paid out of the real Aſſets, and decreed the Debt and Coſts out of the perſonal Aſſets. *Hill.* 1695. between *Neave* and *Alderton.*

22. Upon a ſpecial Report it was adjudged, that in Relation to other Debts, in Point of Priority of Satisfaction, a Duty decreed ſhould take Place before Debts on ſimple Contract and Bonds, and next to Judgments. 1 *Vern.* 143.

23. So where an Adminiſtrator paid Money on Specialties, though

without Notice of Money due by (*a*) Decree, and had fully administred the Assets; yet he was obliged to pay the Money decreed 2 *Vern.* 37.

(*a*) A Court of Equity cannot compel an Executor to perform a Decree made against the Testator before a Statute acknowledged by him; and a Prohibition granted to the Council of *York* accordingly. 1 *Roll. Abr.* 377. An Obligation becoming due after the Death of the Testator, shall be satisfied before a Decree in Chancery. *Styl.* 38 But the Law has been since changed, and Decrees are now held to be equal to Judgments at Law. *Vide* 2 *Vern.* 88.

## (C) What shall be a good Payment, to whom, and at what Time.

1. IF *J. S.* a Scrivener, lends the Money of *A.* to *B.* and takes Security by Mortgage, in Trust for *A.* and *A.* has the Security always in his Possession, and *B.* pays the Money to the Scrivener, who becomes insolvent, such Payment will not discharge *B.* for he having paid the Money, without taking up his Security, is an Evidence that he trusted the Scrivener more than *A.* Decreed on View of Precedents, between *Hen* and *Comisby*, 1 *Chanc. Ca.* 93.

2. So if Money is paid to one who usually received Money for the Obligee, yet if such Receiver has not the Custody of the Bond, Payment to him will not be good. Between *Gerrard* and *Baker*, 1 *Chanc. Ca.* 94.

3. A Man intrusts a Scrivener to put out his Money, he takes Bond for it, and afterwards delivered the Bond to the Obligee, but receives the Interest from Time to Time, and afterwards called in the Principal; and the Obligor paid the Principal to the Scrivener, and took a Note from him to deliver up the Bond (he having it not when the Money was paid in) then the Scrivener writes to the Obligee to send him the Bond, which he accordingly does, but takes the Scrivener's Note, either to deliver back the Bond, or to pay the Money; before the Money paid, the Scrivener breaks, and the Obligee, for a little Money, gets back the Bond from the Scrivener's Clerk, and puts it into Suit; and this Bill was brought by the Obligor to be relieved, and have the Bond delivered up; which was decreed accordingly, with Costs; for the Court held, that from the Time the Bond came into the Scrivener's Hands, he was Trustee for the Obligor (the Money being paid); and it is plain the Obligee trusted the Scrivener, not only with putting out his Money, but with the Custody of his Security. *Pasch.* 1691. between *Abbington* and *Orme.*

4. The Interest-Money of a Mortgage being paid to a Scrivener, who became insolvent; the Question was, who should bear the Loss: It was admitted, 1*st*, That if the Scrivener be intrusted with the Custody of the Bond, he may receive either Principal or Interest. 2*dly*. That if the Scrivener be intrusted with the Mortgage-Deed, but not the Bond, he hath only an Authority to receive the Interest, but not the Principal, because the Giving up the Deed is not sufficient to restore the Estate; but there must be a Reconveyance; whereas the Giving up a Bond is in Law an Extinguishment of the Debt. 3*dly*, That tho' the Scrivener has neither the Custody of the Mortgage nor Bond, yet if the Mortgagee agrees that the Mortgagor shall pay the Interest to the Scrivener, the Interest may be well paid to the Scrivener as long as the Mortgagee lives. 4*thly*, That if his Executor receives Interest from the Scrivener, which became due after the

Mortgagee's Death, he thereby renews the Agreement, and the Mortgagor ſhall not bear the Loſs, if the Scrivener breaks, which was the principal Point in this Caſe. Decreed at the Rolls, and affirmed by *Cowper* Lord Chancellor, on a Rehearing. 7 *Ann.* between *Whitlock* and *Wattham*, 1 *Salk.* 157.

5. If *A.* and *B.* being Truſtees of Money, for the ſeparate Uſe of a Feme Covert, lend it to *C.* who gives Bond to the Truſtees, and the Truſt is declared in the Condition, and the Bond is kept by the Feme; and *B.* having received Money for *C.* they ſettle an Account, and *B.* gives *C.* a Receipt for 100 *l.* as received for the Uſe of the Feme, and *B.* becomes inſolvent, *C.* ſhall not be diſcharged of this 100 *l.* the Truſt being declared in the Condition, and the Feme having the Bond in her Cuſtody. Decreed *Hill.* 1705. between *Baldwin* and *Billingsley*, 2 *Vern.* 539.

6. If there are two Executors, and one of them is decreed not to receive any more of the Teſtator's Eſtate, and a Creditor, by Mortgage to the Teſtator, being preſent at the Pronouncing the Decree, but not a Party to the Suit, pays Money to the Executor, againſt whom the Decree was, he ſhall pay it over again. Decreed *Trin.* 34 *Car.* 2. between *Harvey* and *Mountague*, 1 *Vern.* 57, 122. *S. C.*

7. If an Obligor pay the Money to the Obligee after Aſſignment of the Bond, and Notice thereof, ſuch Payment will not diſcharge him. 2 *Vern.* 540.

8. If a Feme Mortgagee, on her Marriage, ſettles the Eſtate on herſelf for Life, Remainder to the Iſſue of that Marriage, and the Mortgagee brings a Bill to redeem, and ſhe omits ſetting forth the Settlement in her Anſwer, and the Mortgagor has a Decree to redeem, and he pays her the Mortgage-Money; and afterwards the Iſſue of the Mortgagee brings an Ejectment on the Settlement, and recovers the mortgaged Premiſſes, the Mortgagor ſhall be relieved, having paid his Money purſuant to the Decree, and having been in no Fault; for if the Iſſue was cheated, it was by his own Mother. Decreed 1690. between *Chapman* and *Duncumb*, 2 *Vern.* 142.

9. The Plaintiff was indebted to the Defendant upon two Notes, and the Defendant obtained Judgment at Law againſt him for the Money; and then deſiring the Defendant's Forbearance, he told him, that if he would procure one *Defoy* to give him his Note for the Money, he would accept of it, and acknowledge Satisfaction on the Judgment, and deliver up the Plaintiff's Notes; and being to go forthwith out of *England*, he left the Plaintiff's Notes with his Agent here, to be exchanged for *Defoy's*, in Caſe the Plaintiff procured them, and the Plaintiff accordingly procured two Notes payable to the Defendant, which he delivered to the Defendant's Agent, and took up his own Notes; and the Attorney at Law ſtaid all further Proceedings, but would not acknowledge Satisfaction on the Judgment, having no Orders for it from his Client; and before *Defoy* paid any of the Money, he failed, and then the Defendant proceeded at Law on the Judgment; whereupon the Plaintiff brought this Bill to be relieved, and ſuggeſted, that he had diſcounted the Money with *Defoy*, and made him ſatisfaction; but he made no Proof of any ſuch Thing, and therefore at the Hearing his Bill was diſmiſſed by the Maſter of the Rolls; and this Decree was affirmed by my Lord *Keeper* on Appeal. *Hill.* 1700. between *Grubarr* and *Gairand.*

10. If a Mortgagee, by Will, remits Part of the Mortgage-money, provided the Reſt be paid within three Years after his Death, and the Deviſee fails to pay the Money, he ſhall loſe the Benefit of the Deviſe. 1 *Chanc. Ca.* 52.

11. So if a Creditor agrees with his Debtor to take a Sum of Money leſs than his Debt, ſo that it be paid preciſely at ſuch a Day, and he fails of Payment, and afterwards brings his Bill, ſuggeſting ſome equitable Excuſes, why he did not preciſely pay at the Day, and that he tendred the Money within a Day or two afterwards; yet his Bill will be diſmiſſed; for *Cujus eſt dare ejus eſt diſponere.* 1 *Vern.* 210. But if the Security was bettered, as by another's becoming bound with him, *Q. & vide* 1 *Chan. Ca.* 110.

12. But if a Deed of Truſt is erected for Payment of ſuch Creditors as come in within a Year, a Creditor will not be excluded, tho' he doth not come in till after the Year. 1 *Vern.* 260, 319. *S. C.*

## (D) When Debts of a different Nature are due, and a general Payment is made, to which Debt ſhall it be applied.

1. IF *A.* is indebted by Security, carrying Intereſt, and alſo on ſimple Contract, and he pays Money generally, it ſhall be taken to be paid towards Diſcharge of the Debt which carried Intereſt; for it is natural to ſuppoſe, that a Man would rather elect to pay off the Money for which Intereſt was to be paid, than the Money due on Account. *Mich.* 1681. between *Heyward* and *Lomax*, 1 *Vern.* 24. but *Q.*

2. For if *A.* indebted by Specialty, and alſo on ſimple Contract, pays ſeveral Sums, and enters them in his Book, on Account of what was due by Specialty, this Entry ſhall not be ſufficient to make the Application; for altho' the Rule of Law is, that *Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis*; yet this Rule is to be underſtood, when the Perſon, at the Time of Payment, declares on what Account he pays the Money; but if the Payment is general, the Application is in the Perſon receiving. *Per* Lord *Chancellor*, *Hill.* 1707. between *Manning* and *Weſterne*, 2 *Vern.* 606.

3. If *A.* is indebted to *B.* by Bond, in which *J. S.* is bound as Surety, and alſo by ſimple Contract, and *A.* ſtates an Account of both Debts with *B.* and makes a Bill of Sale for ſecuring the Balance, which proves deficient, the Bill of Sale ſhall be applied towards the Diſcharge of both Debts in Proportion: And *per* Lord Chancellor, ſolely for this Reaſon, that both Debts had been caſt into one ſtated Account, and the Bill of Sale made towards Satisfaction of the whole Debt. Decreed *Hill.* 1681. between *Bevis* and *Roberts*, 1 *Vern.* 34.

4. If a Creditor, by Judgment, and alſo by Bond, receives 200*l.* in Part, of the Purchaſer of the Eſtate of the Debtor, but gives no Notice that he would apply it to the Bond-Debt, it ſhall be applied towards Satisfaction of the Judgment, being Part of the Purchaſe-money. Decreed *Trin.* 1687. between *Bret* and *Marſh*, 1 *Vern.* 468.

(E) What

## (E) What Conveyance or Diſpoſition ſhall be fraudulent as to Creditors.

1. THE Wife joined with her Husband in a Mortgage, and levied a Fine with Intent to Bar her Dower; and in Conſideration thereof, the Husband agreed the Wife ſhould have Redemption of the Mortgage; and the Husband afterwards mortgaged the Eſtate twice more; the ſubſequent Mortgagees brought their Bill to ſet aſide the Agreement as (*a*) fraudulent againſt them, which was decreed: But the Wife had her Dower ſecured to her. 1 *Vern.* 294.

(*a*) By the 13 *Eliz. c.* 5. All fraudulent Conveyances of Lands, *&c.* Goods and Chattels, to avoid the Debt or Duty of another, ſhall (as againſt the Party only, *&c.* whoſe Debt or Duty is ſo endeavoured to be avoided) be utterly void, and every of the Parties to ſuch fraudulent Conveyance, *&c.* being privy thereunto and juſtifying the ſame, ſhall forfeit one Year's Value of the Goods, *&c.* provided this Act ſhall not extend to Grants made *Bona fide*, and upon *good Conſideration*, to Perſons not privy to ſuch Colluſion, or having no Notice or Knowledge thereof.

2. The Father makes a voluntary Settlement on Truſtees, on Truſt, to raiſe Money to pay his Debts therein mentioned, and Portions for his younger Children, reſerving 50 *l. per Ann.* to himſelf for Life, Remainder to his Son, *&c.* and the Father continues in Poſſeſſion, and twelve Years after contracts Debts by Bond: And *per Hutchins* Lord *Commiſſioner*, the Settlement is fraudulent as to the Plaintiffs, who are Bond-Creditors, the Truſtees having never entred; and a Deed, tho' not fraudulent at firſt, may afterwards become ſo, by being concealed, or not purſued; but the other two Commiſſioners doubting, it was ſent to be tried at (*b*) Law. *Paſch.* 1692. between *Hungerford* and *Earle*, 2 *Vern.* 261.

(*b*) If *A.* makes a Bill of Sale to *B.* a Creditor, and afterwards to *C.* another Creditor, and delivers Poſſeſſion, at the Time of Sale, to neither, after *C.* gets Poſſeſſion of them, and *B.* takes them out of his Poſſeſſion, *C.* cannot maintain Treſpaſs, becauſe the firſt Bill of Sale is fraudulent againſt Creditors; and ſo is the Second; yet they both bind *A.* and *B.*'s is the elder Title, and the naked Poſſeſſion of *C.* ought not to prevail againſt the Title of *B.* that is prior, where both are equally Creditors, and Poſſeſſion, at the Time of the Bill of Sale, is delivered over to neither. *Trin.* 1706. between *Baker* and *Loyd*. *Per Holt* C. J. but as to fraudulent Conveyances and Bills of Sale, ſee the following Authorities, which are the moſt remarkable Caſes in the Books on this Subject. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brown.* 111. 6 *Co.* 18. 3 *Co.* 80. *Moor* 638. 2 *Bulſt.* 226. 1 *Roll. Abr.* 779. *Palm.* 214. 2 *Leon.* 223. *Co. Lit.* 3. *b. Cro. Eliz.* 810. 11 *Co.* 48. *Dyer* 351. 5 *Co.* 60. *Moor* 615.

3. If *A.* conveys Lands to the Uſe of himſelf for Life, with Power to mortgage ſuch Part as he ſhall think fit, Remainder to Truſtees to ſell to pay all his Debts, and afterwards becomes indebted by Judgments, Bonds and ſimple Contracts, this Conveyance is fraudulent, as againſt the Judgment-Creditors, they having no Notice of the Settlement; for he having reſerved a Power to mortgage what Part he pleaſed, it amounted, in Effect, to a Power of Revocation, and therefore fraudulent, as againſt Creditors by Judgment. *Trin.* 1705. between *Tarback* and *Marbury*, 2 *Vern.* 510.

4. *J. S.* by a Bill of Sale, made over his Goods to a Truſtee for the Defendant, who lived with him as his Wife, and was ſo reputed, he alſo purchaſed a Leaſe of the Houſe wherein he dwelt, in the Name of Truſtee, and declared the Truſt thereof to himſelf for Life, then in Truſt for the Defendant during the Reſidue of the Term; and the Court held the Bill of Sale to be fraudulent as to the Plaintiffs, who were Creditors; but as to Declaration of the Truſt of the Term, that it was good, and not liable to his Debts, the whole

Term never being in him; and it being ſo ſettled on the Purchaſe; and that he might have given the Money to the Defendant to have purchaſed the Leaſe herſelf. *Hill.* 1704. between *Fletcher* and Lady *Lidley*, 2 *Vern.* 490.

5. The Plaintiff had brought his Action againſt *M.* for lying with his Wife; and 13 *January* 1689. *M.* made a Conveyance of his Land to Truſtees, in Truſt, to pay his Debts mentioned in a Schedule annexed to the Deed, and ſuch other Debts as he ſhould appoint, within ten Days in *Hillary-Term* following; the Plaintiff recovered 5000 *l.* Damages againſt *M.* and brought this Bill to be relieved againſt the Deed as fraudulent againſt him, and made to defeat him of his Debt. *Per Cur'*, this Deed is not fraudulent, either in Law or Equity, for ſuch Debts as are named in the Deed; for the Plaintiff was no Creditor at the Making of the Deed; and tho' it were made with an Intent to prefer his real Creditors before this Debt, when it came afterwards to be a Debt; yet it was a Debt founded *in Maleficio*, and therefore it was conſcientious in him to prefer the other Debts before it; but the Plaintiff may come in upon the Surplus after the Debts mentioned in the Schedule, or appointed within ten Days; purſuant to it, are ſatisfied. *Mich.* 1699. between *Lewkner* and *Freeman*.

6. A Man binds himſelf and his Heirs in a Bond, and dies, leaving a Real Eſtate to deſcend to his Heir, and the Heir having aliened the Real Eſtate, the Obligee brought a Bill againſt the Heir and Purchaſer to be relieved, on the (*c*) Statute againſt fraudulent Deviſes; and my Lord Chancellor relieved him. *Note*; It was objected, that that Statute being introductive of a new Law, the Relief on it ought to have been at Law. *Paſch.* 1702. between *Bateman* and *Bateman*.

(*c*) By the 3 & 4 *W. & M.* all Wills concerning Lands, or any Rents, Profits, Term, or Charge out of the ſame, whereof the Deviſors ſhall be ſeiſed in Fee-ſimple, in Poſſeſſion, Reverſion, or Remainder, ſhall be deemed to be fraudulent, and void againſt Creditors upon Bonds or other Specialties, their Executors, Adminiſtrators, *&c.* and ſuch Creditors ſhall have their Actions of Debt againſt the Heir at Law, and the Deviſees, jointly, *&c.*

7. Though by the Statute againſt fraudulent Deviſes, a Man is prevented from defeating his Creditors by his Will; yet any Settlement or Diſpoſition he ſhall make in his Life-time of his Lands, whether voluntary, or not, will be good againſt Bond-Creditors, for that was not provided againſt by the Statute, which only took Care to ſecure ſuch Creditors againſt any Impoſition which might be ſuppoſed in a Man's laſt Sickneſs; but if he gave away his Eſtate in his Life-time, this prevented the Deſcent of ſo much to the Heir, and conſequently took away their Remedy againſt him, who was only liable in Reſpect of the Lands deſcended; and as a Bond is no Lien whatſoever on Lands in the Hands of the Obligor; much leſs can it be ſo when they are given away to a Stranger. Decreed *Trin.* 1718. between *Parſlowe* and *Weedon*.

# CAP. XXIII.

## Cuſtoms of London and York.

(A) What ſhall be deemed a Freeman of London's Eſtate, and ſubject to the Cuſtom.

(B) What Diſpoſition made by a Freeman of his Eſtate, ſhall be good or void, being in Fraud of the Cuſtom.

(C) Perſons intitled to the Benefit of the Cuſtom, and ſubject to it.

(D) Concerning the Cuſtom with Reſpect to the Children of a Freeman, and here of Advancement, bringing into Hotchpot, Survivorſhip and Forfeiture.

(E) Concerning the Widow of a Freeman, and what ſhall be a Bar of her Cuſtomary Share.

(F) Concerning the Legatory or dead Man's Share, what ſhall go out of it, and how it ſhall be diſtributed.

(G) Concerning the Cuſtom of York.

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### (A) What ſhall be deemed a Freeman of London's Eſtate, and ſubject to the Cuſtom.

1. IF a Freeman of *London* has a Mortgage in Fee, this ſhall be counted Part of his Perſonal Eſtate, and will be ſubject to the (*a*) Cuſtom. 1 *Chanc. Ca.* 285. *per Cur'*.

(*a*) When this Cuſtom firſt began, the Citizens of *London* had no Regard at all to a Real Eſtate, for they did not ſuppoſe any Freeman of *London* would purchaſe ſuch Eſtate, but would employ his whole Fortune and Stock in Trade, and for the Benefit of Commerce; which is the Reaſon that neither Eſtates of Inheritance nor Freeholds in Houſes, Lands, &c. are within the Cuſtom. *Mich* 1710. between *Clavell* and *Littleton*, *arguendo*.



2. But

2. But a Leaſe for Years, waiting on the Inheritance of a Citizen, ſhall not be reckoned a Chattel, to be divided among the Children by the Cuſtom; agreed by Counſel, and admitted by the Court. 2 *Chan. Ca.* 160.

3. A Citizen and Freeman of *London*, poſſeſs'd of a Leaſe worth 1500 *l.* bought the Reverſion and Inheritance thereof in the Name of Truſtees, for 150 *l.* and died; and whether this Leaſe being Aſſets at Law ſhould be Part of his Perſonal Eſtate, ſubject to the Cuſtom of *London* (there being no Declaration that it ſhould attend the Inheritance) was the Queſtion; and it was decreed, that tho' this Leaſe would be Aſſets at Law to pay Debts, yet it ſhould attend the Inheritance, tho' there was no Declaration of Truſt that it ſhould do ſo, and not be liable to the Cuſtom; *per Nottingham* Lord *Chancellor*; and this Decree was confirmed on a Rehearing by *North* Lord *Keeper*, *Hill.* 1683. between *Dowſe* and *Derivall*, 1 *Vern.* 104. the Cuſtom of *London* ſhall not prevent the Attendance of a Term on the Inheritance. 1 *Vern.* 2. *per Nottingham Lord Chancellor.*

4. On a Marriage of *B.*'s Daughter with *A.* a Freeman of *London*, *B.* the Father, ſettles a Term for Years in Truſt, that *A.* the Husband ſhould receive the Rents and Profits till ſuch Time as *D.* and *E.* or the Survivor of them ſhould otherwiſe appoint, and then ſuch Perſon as they ſhould appoint; and for Want of ſuch Appointment, for ſuch Perſons as the ſaid *A.* by Will ſhould appoint; and for Want of ſuch Appointment, then in Truſt for the Executors and Adminiſtrators of *A.* the Truſtees having made no Appointment, the Queſtion was, whether this Term ſhould go according to that Appointment, or be looked on as Part of *A.*'s Perſonal Eſtate, who was a Freeman of *London*, and ſo go according to the Cuſtom; and my Lord Keeper was of Opinion, that it was not to be look'd upon as Part of *A.*'s Perſonal Eſtate, becauſe it was never in him, but was ſettled by his Wife's Father, and therefore not ſubject to the Cuſtom. *Hill.* 1702. between *Grice* and *Gooding.*

5. If a Freeman of *London* is made both Executor and reſiduary Legatee, and he dies before he has made his Election, whether he will take as Executor or Legatee; yet the Legacy muſt be conſidered as ſuch, and will be ſubject to the Cuſtom of *London.* 1 *Chanc. Ca.* 310. *per* Lord *Chancellor.*

6. A Citizen of *London* having been a great *Chymiſt*, and ſpent great Part of his Eſtate in that Study, had given to the Defendant, who had married one of his Daughters, a little before his Death, ſeveral Receipts for making Strong-waters, which the Plaintiff, who had married the other Daughter, and who had only 400 *l.* Portion given him, alledged were worth 500 *l. per Ann.* certain Profit; and to induce the Court to think they were of Value, he offered the Defendant 500 *l.* for his Intereſt in them, and prayed, that upon his bringing his 400 *l.* into Hotchpot, the Defendant might be obliged to account for them; but my Lord Chancellor ſaid, that he would not ſo far Countenance theſe Receipts (which is only a Piece of Quackery, and ſerves only to cheat the People) as to put a Value on them in Chancery; and the Plaintiff refuſing to bring his 400 *l.* into Hotchpot, the Bill was diſmiſs'd. *Mich.* 1682. between *Jenks* and *Holford*, 1 *Vern.* 62.

## (B) What Diſpoſition made by a Freeman of his Eſtate, ſhall be good or void, being in Fraud of the Cuſtom.

1. IF a Freeman of *London* is poſſeſſed of a Term for Years, and he voluntarily aſſigns it as a Proviſion for his Child; and dies; yet his Wife ſhall have her (*a*) cuſtomary Share therein; ſo found by a Jury on an Iſſue directed out of Chancery, and tried before *Hale* Ch. Juſt. Between *City* and *City*, 2 *Lev.* 130.

(*a*) Though the Father cannot diſpoſe of the cuſtomary Part from his Children; yet he may by his Will appoint, that if one dies before twenty-one, another ſhall have his Part. 1 *Lev.* 227. but *Q.* and *vid.* 1 *Chanc. Ca.* 199. *cont'*.

2. If a Freeman of *London* makes a Deed of Truſt of a Term for Years to the Uſe of his Will, and he by Will declares it to *J. S.* this Deed and Declaration will be void, being againſt the Cuſtom. Decreed 10 *Car.* 1. between *Nott* and *Smithies*, 1 *Chanc. Rep.* 84.

3. A Citizen of *London* being poſſeſſed of a Term for Years, aſſigns the ſame in Truſt for himſelf for Life, paying 20 *l. per Ann.* to his Son by his firſt Wife, Remainder to his ſaid Son during the Reſidue of the Term; and it was made a Doubt, whether this Aſſignment was good within the Cuſtom of the City of *London*, ſo as to bind the other Children; and it was referred to the *Recorder* to certify. *Paſch.* 1689. between *Clerk* and *Leatherland*, 2 *Vern.* 98.

4. A Freeman of *London* having three Baſtards by *T. J.* confeſſes a Judgment to her in 1000 *l.* defeaſanced for Payment of 500 *l.* in three Months after his Death; and it was held that this Judgment being voluntary ſhould not prevail againſt Debts by ſimple Contract, nor againſt the Widow of the Freeman, but that ſhe muſt have her Share according to the Cuſtom of the City, without any Regard had to this Judgment; but his Debts being paid, the Judgment will bind the legatory Part. Decreed *Hill.* 1690. between *Fairebeard* and *Baivers*, 2 *Vern.* 202.

5. A Freeman of *London*, by Deed in Nature of a Will (the Words of which were, *I give and deviſe*, but it was ſealed and delivered) gave ſeveral Goods to his Children, but kept them in his Poſſeſſion; and it was held *per Curiam*, in Favour of the Widow, that if Goods are abſolutely given away by a Freeman in his Life-time, this will ſtand good againſt the Cuſtom; but if he has it in his Power, as by Keeping of the Deed, *&c.* or if he retains the Poſſeſſion of the Goods, or any Part of them, this will be a Fraud upon the Cuſtom. *Mich.* 1692. between *Hall* and *Hall*, 2 *Vern.* 277. *vid.* 2 *Vern.* 612. *S. P.*

6. A Freeman of *London* having one Daughter, and three Grandchildren by a Son deceaſed, by Deed aſſigns over ſeveral Leaſes in Truſt, to pay any Sum not exceeding 100 *l.* as he ſhould appoint; and by Deed and Will he appoints 500 *l.* to his Daughter, and the Reſidue to his Granchildren; and it was held, that this was in Fraud of the Cuſtom, and void as to the Moiety which the Daughter was intitled to. Decreed *Trin.* 1712. between *Turner* and *Jennings*, 2 *Vern.* 685.

7. But if Money be given by a Freeman of *London* to be laid out in Land, and ſettled on his eldeſt Son for Life, Remainder to his firſt and other Sons in Tail, this ſhall not be reckoned any Part of the Perſonal Eſtate; neither is the Son obliged to bring it into Hotchpot, to intitle him to a Share of the Perſonal Eſtate. *Per* Lord *Chancellor*, *Mich.* 1685. between *Annand* and *Honeywood*, 1 *Vern.* 345. 2 *Chan. Ca.* 118. *S. C.*

8. A Freeman of *London*, who was a Widower, and had ſeveral Children, being poſſeſſed of a very conſiderable Leaſehold Eſtate, on a ſecond Marriage conveys theſe Leaſes, in Conſideration of 2000 *l.* Portion, in Truſt for himſelf for Life, Remainder to his Wife for Life, in Lieu and Bar of all Dower, Cuſtomary Eſtate, *&c.* Remainder to the firſt Son of that Marriage, and ſo to every other Son; and in the Settlement there was an Agreement, that the Truſtees ſhould ſell theſe Leaſes, and inveſt the Money in the Purchaſe of Lands of Inheritance, to be ſettled to the Uſes aforeſaid; but the Husband dying before any Purchaſe made, it was held, 1*ſt*, That the Wife was barred from claiming any other Part of the Perſonal Eſtate. 2*dly*, That the Children by the firſt Venter could have no Right to thoſe Leaſes; neither would this Settlement prevent the Children of the ſecond Marriage from coming in for a Share of the Reſt of the Perſonal Eſtate; for by the Agreement theſe Leaſes are now to be conſidered in Equity; as if a Purchaſe had been actually made, and the Freeman had paid the Money out of his Pocket. Decreed *Mich.* 1700. between *Hancock* and *Hancock*, 2 *Vern.* 665. *S. C.*

## (C) Perſons intitled to the Benefit of the Cuſtom, and ſubject to it.

1. IF an Heir or Co-heir has a real Eſtate ſettled on him by his Father, he ſhall notwithſtanding, come in for his Share of the Perſonal Eſtate, according to the Cuſtom of (*a*) *London*, certified to be the Cuſtom. *Hill.* 1683. between *Civil* and *Rich*, 1 *Vern.* 216. 2 *Jon.* 204. *S. P. Per Curiam.*

(*a*) In *London* there hath been a Court of Orphans, Time out of

Mind, and there hath been a Cuſtom, that if any Freeman or Freewoman dies, leaving Orphans under Age, unmarried, that they have had the Cuſtody of their Body and Goods, and that the Executors and Adminiſtrators have uſed to exhibit true Inventories before them; and if there appeared to be any Debt, to be bound to the *Chamberlain*, to the Uſe of the Orphans, in a reaſonable Sum, to make a good Account thereof upon Oath, after they have received them; and if they refuſed, to commit them till they were bound; this is a good and reaſonable Cuſtom; and if the Eccleſiaſtical Court will compel them to make an Account there againſt this Cuſtom, a Prohibition lies. *Hob.* 247.

2. If a Freeman of *London* leaves *London*, and reſides in the Country, yet on his Death his Perſonal Eſtate ſhall be (*b*) liable to the Cuſtom. 2 *Vern.* 110.

(*b*) Shall be liable, tho' he did not

inhabit or die in *London*. 1 *Rol. Rep.* 316. 1 *Sid.* 250. All the Children of a Freeman, though he dies, and they were born out of *London*, ſhall be Orphans. 1 *Vent.* 180. 1 *Mod.* 80. If a Legacy be given by one Freeman to the Children of another, it ſhall be ſubject to the Cuſtom. *Hutt.* 30. If an Orphan is taken out of the Cuſtody of a Perſon to whom the Court of Orphans have committed him, they may impriſon the Offender till he produces the Infant, or is delivered by Courſe of Law. 1 *Sid.* 250. *Raym.* 116. *S. C.* adjudged, 1 *Lev.* 162. *S. C.* adjudged. So if any one (tho' not a Freeman) without the Conſent of the Court of Aldermen, marry ſuch Orphan, under the Age of twenty-one, tho' out of the City, they may fine him, and impriſon him for Non-payment thereof; for if the Cuſtom ſhould not extend to Marriages out of the City, their Power would be but in vain. *Hill.* 22 & 24 *Car.* 2. between the *King* and *Harwood*, 1 *Vent.* 178. 1 *Lev.* 32. *S. C.* Adjudged, 1 *Mod.* 79. *S. C.*

3. A Citizen of *London* dies, leaving a Widow, and no Children, but has ſeveral Grandchildren living at the Time of his Death; and the Queſtion was, whether they were within the Cuſtom of the City of *London*, or not; and the Lord *Chancellor* taking Time to conſider of the Caſe, and conſulting the *Recorder* and ſeveral of the *Aldermen*, delivered his Opinion, that Grandchildren were not within the Cuſtom of the City of *London*. *Paſch.* 1686. between *Fowke* and *Hunt*, 1 *Vern.* 397.

4. But an after-born Child ſhall come in with the Reſt of the Children for a cuſtomary Share of a Freeman of *London*'s Perſonal Eſtate. Decreed *Trin.* 1718. between *Walſam* and *Skinner*.

## (D) Concerning the Cuſtom with Reſpect to the Children of a Freeman; and here of Advancement, bringing into Hotchpot, Survivorſhip, and Forfeiture.

1. ANY Proviſion made by the Father, in his Life-time, for his Children is an Advancement within the Cuſtom, unleſs it be declared by Writing, that they are not ſufficiently advanced; and for ſome Time it was held, that in ſuch Writing there muſt be Mention made, what Sum they received from their Father, becauſe of bringing it into Hotchpot. 1 *Vern.* 89. *Per Curiam*: But whether there be any Difference in giving a Portion before, or after Marriage, or whether Preſents at Chriſtnings or Lyings-in are to be reckoned an Advancement, *Q. & vide* 1 *Vern.* 61.

2. By the Cuſtom of the City of *London*, where a Child is married with the Father's Conſent, and there is a Portion given in Marriage, ſuch Child is debarred from claiming any Benefit of the Orphanage Part, unleſs the Father ſhall by Writing under his Hand and Seal, not only declare, that ſuch Child was not fully advanced, but likewiſe mention in certain, how much the Portion given in Marriage did amount unto, that ſo it may appear what Sum is to be brought into *Hotchpot*. 1 Vern. 216. *But this Matter ſeems to be well ſettled by the following Caſe and Certificate.*

3. Sir *Ralph Box*, a Freeman of *London*, had two Sons and two Daughters, both the Daughters were married in his Life-time; and upon the Marriage of one of them with the Plaintiff, Sir *Ralph* entred into Articles, to give 2000 *l.* with her for her Portion; and there being an Expectation that her Grandmother would leave her ſomething conſiderable at her Death, which the Plaintiff's Friends were not willing to rely on; Sir *Ralph* covenanted to pay the further Sum of 400 *l.* for what the Grandmother ſhould leave her; the Marriage took Effect, and Sir *Ralph* paid the 2000 *l.* and 400 *l.* and the Grandmother died, and left the Plaintiff's Wife nothing; and now Sir *Ralph* being dead, the Plaintiff and his Wife brought this Bill, ſuggeſting, that ſhe was not fully advanced, tho' Sir *Ralph* had declared by his Will, that ſhe was, and therefore ought to have an Account of his Perſonal Eſtate, and her Portion ought to be made up to her a full cuſtomary Part; the Court deſired the Recorder of *London* to certify what the Cuſtom of the City was in

ſuch Caſes, who certified, (*a*) *&c.* and my Lord Chancellor ſaid, that the Certificate being the proper Trial in this Caſe, and being againſt the Defendant; for when the Certainty of the Advancement appears, the Father's declaring or not declaring her fully advanced, does not avail; therefore an Account muſt be taken of the Eſtate, and the 2000 *l.* muſt be made up her full cuſtomary Part, and the 400 *l.* paid for the Grandmother's Legacy muſt not be taken as any Part, that being paid on a Bargain only. Decreed *Trin.* 1699. between *Chace* and *Box*.

(*a*) To ——, May it pleaſe your Lordſhip, whereas by an Order of his Majeſty's High Court of Chancery of the 14th of *May* laſt, in a Cauſe there depending, between *James Chace* and *Elizabeth* his Wife, Plaintiffs, and Sir *Ralph Box*, Knt. Defendant, the Lord Mayor and Aldermen are required to certify the Cuſtom of *London*, by the Mouth of the Recorder, in the Points following, (*viz.*) Whether if a Citizen of the ſaid City hath, in his Life-time, advanced any of his Daughters in Marriage with a Portion of Money, and ſhall, by any Writing under his Hand and Seal, declare ſuch Daughter was by him fully advanced; whether ſuch Daughter, by the Cuſtom of the ſaid City, is not excluded from having or demanding any further, or other Part of her Father's cuſtomary Eſtate, as an Orphan of the ſaid City; or whether ſhe ſhall, after her Father's Deceaſe, have a Share of his cuſtomary Eſtate, bringing what ſhe received on her Marriage into Hotchpot: *We*, the Lord Mayor and Aldermen of the ſaid City of *London*, having heard the ſaid Parties, and their Counſel learned in the Law, do humbly certify your Lordſhip, that by the Laws and Cuſtoms of the City, if any Freeman's Child, Male or Female, be married in the Life-time of his or her Father, by his Conſent, and not fully advanced to his or her full Part or Portion of his or her Father's perſonal or cuſtomary Eſtate, as he ſhall be worth at the Time of his Deceaſe; then every ſuch Freeman's Child ſo married, as aforeſaid, ſhall be excluded and debarred from having any further Part or Portion of his or their ſaid Father's perſonal or cuſtomary Eſtate, to be had at the Time of his Deceaſe, except ſuch Father by his Laſt Will and Teſtament, or ſome other Writing by him written, and ſigned with his Name or Mark, ſhall declare or expreſs the Value of ſuch Advancement; and then every ſuch Child, after the Deceaſe of his or her ſaid Father, producing ſuch Will or other Writing, and bringing ſuch Portion ſo had of his or her Father, or the Value thereof, into Hotchpot, ſhall have as much as will make up the ſame a full Child's Part or Portion of the cuſtomary Eſtate his or her ſaid Father had at the Time of his Deceaſe; *notwithſtanding* ſuch Father ſhall, by any Writing under his Hand and Seal, declare ſuch Child was by him fully advanced. Dated, *&c.*

4. A Freeman of *London* having advanced his Daughter with a Portion, and intending to exclude her from any further Share (on ſome Diſpleaſure taken againſt her) made his Will, and thereby recites, that he had advanced her with 300 *l.* and upwards, gives her five Shillings, and no more, and died; and after his Death the ſaid Daughter brought a Bill to have the ſaid 300 *l.* made up a Moiety of his Eſtate (he having no other Child, and the Cuſtom not extending to Grandchildren,) and had a Decree accordingly; for the Words *and upwards*, are *Certum in Incerto*, and not to be regarded, tho' it was objected it might be 1000 *l.* or 2000 *l.* or any other Sum above 300 *l.* Decreed *Hill.* 1704. between *Bright* and *Smith*.

5. A Settlement of a real Eſtate on a Child is no Advancement, nor to be brought into Hotchpot. 1 *Chan. Ca.* 160. Neither does a Deviſe of a real Eſtate bar the Child of its cuſtomary Share of the Perſonal Eſtate. 2 *Vern.* 753.

6. If a Freeman of *London* advances a Child in Part by a Portion which is to be brought into Hotchpot, ſuch Portion or Advancement muſt be brought into the orphanage Part only. *Per* Lord *Chancellor*, *Mich.* 1685. between *Beckford* and *Beckford*, 1 *Vern.* 345. 2 *Vern.* 281. *S. C.* decreed *viz.* that the Eſtate left by the Teſtator, ſhall be firſt divided into three Parts, *viz.* the Widow's third Part, the orphanage Part, and the Legatory or teſtamentary Part, and then what the Children in Part advanced had received, ſhall be brought into the orphanage Part only, and not to increaſe the whole Eſtate; and therefore,

7. If there be an only Child in Part advanced in the Father's Life-time, ſuch Child ſhall not bring her Part into Hotchpot, there being none

none in equal Degree with her; agreed between *Fane* and *Bence*, 2 *Vern.* 234. 2 *Vern.* 630. *S. P.* between *Dean* and Lord *Delaware*; and tho' there be a Widow, yet ſhe is to have her Third excluſive. 2 *Vern.* 754. *S. P.* for if it were to be brought in, it muſt fall again into the Child's Part.

8. If a Freeman of *London* dies, leaving two Daughters and a Wife, and one of the Daughters dies, tho' after a Diviſion and Partition of the Perſonal Eſtate, yet the ſurviving Siſter ſhall have the Whole of the Orphanage Part. *Per* Lord *Chancellor*, *Trin.* 1713. between *Leoffes* and *Lewen*.

9. If a Child intitled to an orphanage Share dies before twenty-one, and unmarried, her Share will ſurvive to the Reſt of the Children, tho' ſhe makes a Will, and deviſes it away at ſeventeen Years of Age. *Per Cur'*, 2 *Vern.* 559.

10. But if a Man marries an Orphan, who dies under twenty-one, her orphanage Part ſhall not ſurvive to the other Children, but ſhall go to the Husband. Between *Fouke* and *Lewen*, 1 *Vern.* 88.

11. If a Man marries a City Orphan, and her Portion is in the Chamber of *London*, and he dies before her Age of twenty-one, this ſhall not be looked upon as a *Depoſitum* for the Husband, but as a *Debitum* or *Choſe in Action*, which he not having taken out, or reduced into Poſſeſſion, muſt ſurvive to the Wife. *An. Pheſant's* Caſe, 2 *Vent.* 340. 1 *Chan. Ca.* 181. *S. C.*

12. If the Daughter of a Citizen of *London* marries in his Lifetime againſt his Conſent, unleſs the Father be reconciled to her before his Death, ſhe ſhall not have her orphanage Share of his Perſonal Eſtate; and it would be unreaſonable to take the Cuſtom to be otherwiſe. *Hill.* 1 & 2 *Jac.* 2. between *Foden* and *Howlett*, 1 *Vern.* 354. *Per* Lord *Chancellor*.

## (E) Concerning the Widow of a Freeman, and what ſhall be a Bar of her cuſtomary Share.

1. IF a Freeman of *London* dies without Iſſue, his Widow ſhall have her Widow's Chamber, and a Moiety of the Reſt of the Perſonal Eſtate; and as to the other Moiety, ſhe may plead herſelf Adminiſtratrix to her Husband, and a Proviſo in the Act of Diſtributions, that it ſhould not prejudice the Cuſtom of *London*, and the Plea will be allowed. *Hill.* 1682. between *Matthews* and *Newby*, 1 *Vern.* 132. But *Q.* as to this laſt Point, for the *Proviſo* in the Act extends only to the cuſtomary Share; and therefore the dead Man's Share muſt be divided according to the Statute of Diſtributions.

2. A Freeman of *London* having no Children, made his Will, and thereby deviſed a Chattel-Leaſe to one, and all his Books to another, and as to all the Reſt of his Eſtate, conſiſting in Money, Goods, Mortgages and Credits, he gave the yearly Profits and Benefit thereof to the Plaintiff, his Wife, for Life, by quarterly Payments; and directed his Executors, out of his Eſtate, to pay the Plaintiff's Funeral Charges after her Death, and deviſed to her the Uſe of his Plate, *&c.* during her Life, and directed that his Stock and Eſtate in the Hands of one *J. C.* ſhould remain there during his Wife's Life, and the Product paid to her for her Maintenance, and deviſed ſeveral particular Legacies; and after the Death of his Wife,

deviſed over the Surplus and Reſidue to his Brother's Children; on a Bill brought by the Widow, it was decreed at the *Rolls*, that by the Cuſtom of *London* ſhe ſhould have her Widow's Chamber, and one intire Moiety of the Perſonal Eſtate, after Debts paid, as well of the Leaſe and Books which were ſpecifically deviſed away, as of all the Reſt and Reſidue of his Eſtate, by the Cuſtom of the City of *London*, and ſhould have the Benefit of the other Moiety for Life, by the Will; and decreed an Account accordingly; which Decree was confirmed upon an Appeal to the Lords Commiſſioners. *Mich.* 1689. between *Webb* and *Webb*, 2 *Vern.* 110.

3. *J. W.* a Freeman of *London*, on a Treaty of Marriage with *M. P.* a Widow, who had a conſiderable Fortune and ſeveral Children, agrees that he ſhould have only 600 *l.* of her Fortune, and the Reſidue to be ſettled for her ſeparate Uſe, and after her Death, for the Benefit of her Children; and accordingly an Indenture was prepared and executed before Marriage, whereby ſhe, with his Aſſent, aſſigns over her Fortune to Truſtees, in Truſt, that ſhe ſhould receive the Profits of it for her own ſeparate Uſe during her Life, and after her Death that the ſame ſhould go and be divided equally amongſt her Children; and *J. W.* in Conſideration of the intended Marriage and Marriage Portion of 600 *l.* makes a Settlement on her, and at the End of the Deed covenants, that if the ſaid *M. P.* ſhould ſurvive him, then his Executors ſhould pay and deliver to the ſaid *M. P.* 600 *l.* out of his Perſonal Eſtate; the Marriage takes Effect, *J. W.* dies without Iſſue; and it was inſiſted upon, that the Widow was intitled to this 600 *l.* in the firſt place, purſuant to the Marriage Agreement, and to a full Moiety of the Perſonal Eſtate, as his Widow, by the Cuſtom of *London*; but the Maſter of the *Rolls* held, that the Agreement mentioning him a Citizen of *London*, ſhews that the Cuſtom might well be in View at that Time, and that this Compounding for 600 *l.* in all Events, exempted her out of the Reaſon of the Cuſtom; and decreed accordingly. *Hill.* 1711. between *Whithill* and *Phelps*, *vide* Letter (B) Caſe 7th, *S. P.*

4. A Widower and a Widow being about to intermarry, and having only Perſonal Eſtate, by Articles made before Marriage agreed, that in Caſe the Husband ſurvived, he ſhould have 2000 *l.* only out of his Wife's Perſonal Eſtate, and the Reſt to be at her Diſpoſal, *&c.* and in Caſe the Wife ſurvived, then ſhe was to have 2000 *l.* out of the Husband's Perſonal Eſtate, without ſaying *only*, or *no more*; the Husband being a Freeman of *London* died, and his Wife brought her Bill for an Account of his Perſonal Eſtate, over and above the 2000 *l.* and to be let into her cuſtomary Share thereof; but it was decreed, that the equal Conſtruction of theſe Articles muſt be, to exclude the Wife from any further Share out of the Eſtate; and tho' the Words were not ſo full to exclude her; yet the Intent of the Articles appearing to be a mutual reciprocal Agreement between them for ſettling each other's Claim, ought not to be extended larger on one Side than on the other; and therefore the Wife muſt have only the 2000 *l.* Decreed *Mich.* 1714. between *Pott* and *Lee*.

5. On a Treaty of Marriage between the Defendant and her late Husband, *Edmund Waterſon*, deceaſed, Indentures of Leaſe and Releaſe, by Way of Settlement, were executed; whereby in Conſideration of the intended Marriage, and 2000 *l.* Marriage-Por-

tion, Lands to the Value of 200 *l. per Ann.* were limited to the Defendant for Life, for her Jointure, and in full of all Dower and Title of Dower to any Lands Tenements or Hereditaments, whereof or wherein her ſaid intended Husband was or ſhould be ſeiſed of any Eſtate of Inheritance during the Coverture between them; and in the Releaſe, *William Waterſon*, Father of *Edmund*, covenanted, that in Caſe *Edmund* ſurvived him, that then all his Real and Perſonal Eſtate, whereof he ſhould die ſeiſed or poſſeſſed, ſhould deſcend and come to *Edmund*, his Heirs, Executors and Adminiſtrators; the Marriage takes Effect, *William Waterſon* dies; whereby ſome Real Eſtate and a conſiderable Perſonal Eſtate came to *Edmund*; then *Edmund* makes his Will, and having no Iſſue, deviſes 500 *l.* to his Wife, and ſome other Legacies, and deviſes the Reſidue of his Perſonal Eſtate to be laid out in a Purchaſe, to be ſettled on the Plaintiffs, *Bonnells*, who were his Nephews, and makes the Plaintiff, *Atkins*, his Executor and dies; and the Bill was brought againſt the Widow for a Diſcovery and Account of the Perſonal Eſtate, and that it might be laid out in a Purchaſe, and ſettled purſuant to the Directions in the Will. The Widow inſiſted by her Anſwer, that her Huſband was a Freeman of *London*, and that he dying without Iſſue, ſhe, as his Widow, was intitled to a Moiety of his Perſonal Eſtate, as her cuſtomary Share; and whether ſhe were ſo intitled, or not, was the ſingle Queſtion. For the Plaintiffs it was urged, that ſhe was not, for that by this Settlement ſhe was provided for already; and by the Cuſtom of *London*, where the Widow is *compounded* with, as they call it, ſhe cannot be let in to any other Part of her Husband's Perſonal Eſtate; that this was founded on very good Reaſon, that the Wife might not depend for Subſiſtence on the Caſualties of Trade and other Contingencies, whereto the Perſonal Eſtate might be liable; and therefore, ſince ſhe had in all Events ſecured herſelf of a Proviſion, and taken out ſo much from the Husband's Power of diſpoſing of, ſhe ought to reſt ſatisfied with that Proviſion, that if this had not been intended in full of her cuſtomary Part, there would have been negative Words, or ſome Proviſo in the Settlement, that it ſhould not extend to exclude her of her cuſtomary Share; that the Perſonal Share was under Conſideration, as appears by the Covenant concerning the Diſpoſition of it, in Caſe the Husband ſurvived his Father; and therefore the Proviſion being general muſt be intended to be compleat, and to exclude her from any other; and on this Side were cited ſeveral Caſes wherein a Compoſition with the Wife has been held a Bar of her cuſtomary Share: On the other Side it was argued, that ſhe ought not, by this Settlement, to be excluded from her cuſtomary Part; that if no Settlement had been made, ſhe would, on her Marriage, have been intitled to her Dower at Common Law, out of the Real Eſtate, and to her cuſtomary Share out of the Perſonal Eſtate; that this Jointure came only in Lieu of Dower of the Real Eſtate, and that by the Act of Parliament 27 *H.* 8. and therefore could be no Recompence for her cuſtomary Share of the Perſonal Eſtate; that ſhe was intitled to one by the Common Law, and to the other by the Cuſtom; and a Recompence provided for one of them only, could be no Recompence for the other, which ſhe claimed by a diſtinct independent Title; that there being no negative Words in the Deed made it the Stronger;

that

that they did not intend to exclude her of her cuſtomary Share; and therefore it was tied up barely in Bar of her Dower and Title of Dower; and ſuppoſe by the Settlement there had been a Proviſion for her out of the Perſonal Eſtate only, and that had been expreſſed to be in full of her Share of the Perſonal Eſtate, would that have excluded her from her Dower of the Real Eſtate? no more ought this Jointure, which goes only in Bar of her Dower of the Real Eſtate, be conſtrued to exclude her from her cuſtomary Share of the Perſonal Eſtate; and the Entries in the City Books muſt be intended where the Compoſition (as they call it) was only out of the Perſonal Eſtate; and as to the Caſes which have been in this Court, they are all to this Purpoſe. My Lord *Chancellor* ſaid, he thought the Reaſon of the Caſe very ſtrong for the Defendant, but that this Point might be ſettled in a proper Way, deſired to have the Cuſtom certified, whether ſuch Jointure before Marriage being limited to be only in Bar of her Dower, ſhould preclude her likewiſe of her cuſtomary Share; afterwards the Cuſtom was certified to be, *That where a Freeman, before Marriage, makes a Settlement on his intended Wife, and the ſame is thereby declared to be in full Lieu and Bar of her Share of his Perſonal Eſtate, that ſhe is thereby barred to claim any of his Perſonal Eſtate after his Death; but if the ſame were expreſſed to be in Bar only of Dower, or Thirds of Lands, Tenements and Hereditaments, they ſaid the ſame had never been in Controverſy in this Court, nor had they any Cuſtom concerning it.* It was afterwards decreed to be no Bar of the cuſtomary Share. *Paſch.* 2 *Geo.* 1. between *Atkins* and *Waterſon*.

6. In this Caſe the Cuſtom of *London* was certified to be, that if a Woman, before her Marriage with a Freeman, accepts a Settlement out of his Perſonal Eſtate, without any Notice taken of the Cuſtom, this bars her of any cuſtomary Share of his Perſonal Eſtate after his Death, if ſhe ſurvives; but *note*; this means only, that ſhe cannot ſingly and meerly, by Virtue of the Cuſtom, claim any other Part; not that ſhe is thereby debarred from the Benefit of any Gift or Deviſe he thinks fit to make her. *Trin.* 1727. between *Lewen* and *Lewen*.

## (F) Concerning the legatory or dead Man's Share, what ſhall go out of it, and how it ſhall be diſtributed.

1. A Citizen of *London* deviſed 700 *l.* for Mourning; and the Queſtion was, Whether it ſhould come out of the whole Eſtate, or only out of the legatory Part; for it was inſiſted, that if there had been no Directions by the Will, or if the Will had only directed, that the Expences of the Funeral ſhall not exceed ſuch a Sum, then the Deduction muſt have been out of the whole Eſtate: But *per Curiam*, Mourning deviſed by the Will muſt come out of the legatory Part, and not leſſen the orphanage or cuſtomary Share. *Mich.* 1691. between *Deakins* and *Buckley*, 2 *Vern.* 240.

2. If a Freeman of *London* dies Inteſtate, leaving a Wife and Children, one Third of his Perſonal Eſtate, and the Widow's Chamber muſt go to the Wife, and one other Third to the Children and

and the dead Man's Third muſt go according to the Statute of Diſtributions, *viz.* Two Thirds to the Children, and the other Third to the Wife, and that this dead Man's Third was not at all under the Controul of the Cuſtom; agreed on as an undoubted Rule. *Trin.* 1718. between *Walſam* and *Skinner*, 2 *Vern.* 559. *S. P.*

3. If a Freeman of *London* deviſes Legacies more than the legatory Share comes to, the Legatees ſhall abate in Proportion; and if a Legacy be given to a Child, tho' this ſhall go out of the legatory Part, and cannot go in Part of *Orphanage*; yet if the legatory Part is not ſufficient, the Legatee muſt abate in Proportion. *Vide* 2 *Vern.* 754. 2 *Vern.* 111.

4. A Citizen of *London* being poſſeſſed of a Perſonal Eſtate to the Value of 18000 *l.* and having made a competent Jointure to his Wife on his Marriage, it was agreed, that he might diſpoſe of two Thirds of his perſonal Eſtate by his Will, *viz.* one third Part, which would have belonged to his Wife, had he not made a Settlement on his Marriage in Lieu thereof, by which Means her cuſtomary Part comes to be at his Diſpoſal; and one other third Part which is the Legatory Part, which every Citizen may diſpoſe of by his Will; and having two Sons and two Daughters, he makes his Will, and by it deviſes two Thirds of his whole Eſtate to his Daughters, and one Third to his Sons; hereupon the *Chamber* of *London* would have diſtributed his Eſtate in this Manner: 1*ſt*, To make an equal Diviſion of the cuſtomary Part, *viz.* of 6000 *l.* amongſt all the four Children, which was 1500 *l.* a-piece, and then allot two Thirds of the Reſidue to the Daughters, and one Third to the Sons; ſo that by this Diviſion each Daughter ſhould have only 5500 *l.* and each Brother ſhould have 3500 *l.* But the Lord Chancellor declared, that the Intent of the Teſtator did to him plainly appear to be, that his Daughters ſhould have two intire Thirds of his whole Eſtate, which is 6000 *l.* a-piece; and it was decreed accordingly. *Paſch.* 1681. between *Love* and ——, 1 *Vern.* 6.

5. In this Caſe it was held, that where a Freeman of *London* made his Will, and deviſed Legacies to his Children more than their orphanage Part would amount unto, without taking any Notice whatſoever of the Cuſtom, that theſe Legacies ſhall be a Satisfaction of their orphanage Shares, to which they were intitled by the Cuſtom in the Nature of a Debt, and that the Legacies ſhall not come out of the teſtamentary or dead Man's Part, becauſe it is held in this Court, that they ſhall not take both by the Will and the Cuſtom too; but where ſuch Legacies are leſs than their orphanage Shares, whether they ſhall be *pro tanto* in Satisfaction, he was in great Doubt, and ſent it to the City to certify; though he ſeemed rather to think they ſhould, in that Caſe, take both, eſpecially if none of the Deviſes in the Will were thereby diſappointed. *Trin.* 1729. at the *Rolls*, between *Nicholls* and *Nicholls*.

## (G) Concerning the Cuſtoms of York.

1. IF a Freeman of *London* dies in the Province of *York*, ſeiſed and poſſeſſed of a Real and Perſonal Eſtate, the Cuſtom of the City of *London* for the Diſtribution of his Perſonal Eſtate, ſhall pre-

vail, and controul the Cuſtom of the Province of *York*. 2 *Vern.* 48. held clearly *per Curiam*.

2. So if a Freeman of *London* dies in *York*, his Heir ſhall come in for a Share of the Perſonal Eſtate, tho' by the Cuſtom of *York* he is debarred thereof; for the Cuſtom of *London*, which follows the Perſon, ſhall be preferred to that of *York*, which is only local. *Mich.* 1688. between *Cholmely* and *Cholmely*, 2 *Vern.* 82. *per Curiam.*

3. If a Man within the Province of *York* dies Inteſtate, leaving a Wife and no Child, the Wife ſhall have one Moiety of the Perſonal Eſtate by the Cuſtom, and the other Moiety being without the Cuſtom, ſhall be diſtributed according to the Act of Diſtributions. Decreed *Trin.* 1687. between *Stapleton* and *Sherrard*, 1 *Vern.* 465, 134, 305, 432, *S. C.*

4. A Man who lived in the Province of *York* died Inteſtate, having advanced all his Children in his Life-time; and it was held, that the Perſonal Eſtate which he died poſſeſſed of ſhould be ſettled according to the Act for ſettling Inteſtates Eſtates. *Mich.* 1683. between *Goodwin* and *Ramſden*, 1 *Vern.* 200. *Vide* 2 *Vern.* 263. where a Perſon who was an Inhabitant of the Province of *York* died Inteſtate, having before his Marriage made a Settlement on his Wife in Bar of her cuſtomary Share, and leaving Children; the Queſtion was, how Diſtribution ſhould be made; but there is no Reſolution.

5. The Inteſtate being an Inhabitant in the Province of *York*, left Iſſue a Son and a Daughter only, and no Widow; the Daughter had a Portion given her in Marriage in Lieu and full Satisfaction of what ſhe might claim by the Cuſtom of the *Province of York*; the Son was alſo advanced by a Settlement of Lands; and the Queſtion was, how the Eſtate ſhould be diſtributed; for the Heir it was inſiſted, that now the Cuſtom of the *Province of York* is to be quite laid out of the Caſe, and the ſame Diſtribution made of the Eſtate as of any other Inteſtate's Eſtate, and by Conſequence the Daughter to bring her Portion into *Hotchpot*, but the Heir to have a full Share, without Regard to what Lands had been ſettled upon him: But *per Cur'*, the Daughter muſt not bring back her Portion into *Hotchpot*, for that came in Lieu of her cuſtomary Part; and was the Price the Father thought fit to give her for the ſame. *Trin.* 1692. between *Gudgeon* and *Ramſden*, 2 *Vern.* 274.

6. An Inhabitant of *York*, having on his Marriage ſettled his Real Eſtate on himſelf for Life, Remainder as to Part on his Wife for a Jointure, Remainder of the Whole to his firſt and other Sons in Tail, Remainder to his own right Heirs; the Queſtion was, whether the Son was thereby excluded by the Cuſtom of the *Province* of *York*, from having any Share of his Father's Perſonal Eſtate; which Point being directed to be tried on an Iſſue at Law; and it being found that he was thereby debarred, the ſame was decreed accordingly. *Trin.* 1700. between *Conſtable* and *Conſtable*, 2 *Vern.* 375.

# CAP. XXIV.

## Decree.

(A) Concerning the Drawing up and Inrolling of Decrees.

(B) Who are bound by the Decree.

(C) Concerning Error in the Decree.

(D) Concerning the Performance and Execution of a Decree.

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### (A) Concerning the Drawing up and Inrolling of Decrees.

1. IN the Drawing up a Decree, it is not ſufficient for the Regiſter to recite the Bill and Anſwer, and then add, that upon the Reading of the Proofs, and hearing what was alledged on either Side, it was decreed ſo and ſo; but the Facts which were proved, and allowed by the Court as proved, muſt be particularly mentioned in the Decree; otherwiſe if a Bill of Review be brought, thoſe Facts ſhall be taken as not proved; for elſe a Decree could not be reverſed by a Bill of Review. 1 *Vern.* 214. 2 *Chan. Ca.* 161. *S. P.*

2. A Decree being pronounced in *Michaelmas Term*, and the Defendant dying ſoon after, on a Motion to have it inrolled, it was held by my Lord *Chancellor* to be a Thing often done; and that it was like a Judgment at Law, which, if pronounced before, may be entered after the Party's Death; and the Decree was inrolled accordingly. 2 *Chan. Ca.* 227. *Nel. Chan. Rep.* 169. *S. P.* 3 *Chan. Rep.* 73. *S. P.*

3. So where a former Decree of Diſmiſſion being pleaded in Bar to a ſecond Bill, it was objected, that the Diſmiſſion and Decree could not be pleaded in Bar, becauſe the Decree was not ſigned and inrolled; and if the Defendant would have it, that it was a Suit ſtill in Being, then the Plea was a Plea in Abatement only: But *per Cur'*, Either that Suit was for the ſame Matter as the preſent, or not; if not, you ought to have moved to have had the Plea referred; but if it is,

then that Suit is either depending or determined, and either Way is pleadable. *Hill.* 1684. between *Pritman* and *Pritman*, 1 *Vern.* 310.

4. But if an Adminiſtrator obtains a Decree, that he, his Executors or Adminiſtrators may redeem a Mortgage, and he dies Inteſtate before Inrolment of the Decree, ſuch Decree ſhall not afterwards be inrolled for the Benefit of his Adminiſtrator, for the firſt Adminiſtrator's Title is gone. 2 *Chan. Ca.* 248.

## (B) Who are bound by the Decree.

1. ALL original Parties to the Suit, and likewiſe all thoſe who come in *pendente lite*, and are made Parties thereto by Proceſs, are bound by the Decree. 1 *Chan. Ca.* 3, 153.

2. If there are two Executors, and one of them by Decree is prohibited to receive any more Money, or meddle farther with the Teſtator's Effects, and a Mortgagor to the Teſtator, who was preſent at the Hearing and Pronouncing the Decree, afterwards pays the Mortgage-money to the Executor who had the Decree againſt him, he muſt pay it over again. 1 *Vern.* 57. 122. *S. C. But for this* vide *Title* Notice, *and what ſhall be a* Lis Pendens.

3. An Agreement by ſome Tenants of a Manor to incloſe or ſtint a Common, will be decreed in Equity, and ſuch Decree will bind two or three humourſome Tenants who oppoſe it. 1 *Chan. Ca.* 48. 2 *Vern.* 103. *S. P.*

4. So where a Bill was brought by ſome few Tenants of *Greyſtock* Manor againſt the Lord, to ſettle the Cuſtoms of the Manor as to Fines upon Deaths and Alienations; and an Iſſue was directed to be tried at Law, and found, that upon the Death of the Lord or Tenant, there was due an uncertain Fine, but not exceeding a Twenty-penny Fine, that is, twenty Years old Rent; and upon Alienation of the Tenant, a Fine altogether uncertain and arbitrary; and it was inſiſted upon, that there being but ſome of the Tenants Parties to this Bill, the Reſt would not be bound by this Trial: But my Lord Keeper held they would; and he ſaid he remembred the Caſe of *Nether Wierſdale*, between Lord *Gerrard* and ſome few Tenants, and Lord *Nottingham*'s Caſe in the *Dutchy*, concerning the Cuſtoms of *Daintree* Manor, for Grinding and Baking at the Lord's Mill and Bake-houſe, and ſaid in theſe and 100 others, all were bound, tho' only a few Tenants Parties; elſe where there are ſuch Numbers, no Right could be done, if all muſt be Parties, for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute, for it is the Caſe of all; and in the *Exchequer* and *Dutchy* it would certainly be ſo, and no Difference when it is here; and he cited Sir *William Boothby*'s Caſe in the *Dutchy* laſt *Michaelmas Term*, where a Bill concerning the Cuſtom of Grinding at the Lord's Mill was amended, and made to be on Behalf of the Plaintiffs and all the Reſt of the Tenants; and as to the Objection, that the Courts of *Exchequer* and *Dutchy* are Courts of Revenue, and go by other Rules than ordinary Courts of Equity, he ſaid, that was of no Weight; and held, that all muſt be bound here as well as there. *Mich.* 1701. between *Brown* and *Howard*.

5. The

5. The Plaintiff, being *Vicar* of the Pariſh of *Wirkſworth* in *Derbyſhire*, brought a *Subpœna* in the Nature of a *Scire Facias*, againſt the Defendants, to enforce the Performance of a Decree made 5 *Car.* 1. by which (amongſt other Things) it was decreed, that all the *Miners* within the ſaid Pariſh, as well for the Time being, as to come, ſhould pay the *tenth Diſh* of Lead Oar cleanſed, *&c.* to the Vicar of the ſaid Pariſh for the Time being, for Tithes, *&c.* the Defendants appeared to the *Scire facias*, and ſet forth, that they claimed not in Privity under any of the Parties to that Decree, and that ſome of them were ſeiſed of *Mines* not then found out or opened, and that there had not been any Performance or Execution of the Decree, and other Matters in Avoidance. The Court held, that the Decree extends to all Miners within the Pariſh for the Time being or to come; ſo the Defendants are within the Letter, and expreſly bound by the Decree, and as long as the Decree ſtands in Force muſt obey. *Mich.* 1690. between *Brown* and *Booth*, 2 *Vern.* 184.

6. If a Deviſee obtains a Decree to hold and enjoy the Lands againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will, and pending this Suit a third Perſon gets an Aſſignment of a Mortgage made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir, having Notice that there was ſuch a Will, the Purchaſer ſhall not be admitted to diſpute the Juſtice of the Decree, nor to try at Law, whether the Will was not cancelled by the Teſtator. 2 *Vern.* 216.

7. But if a Mortgagee, after ten Years Suit, four Reports, and two Trials at Law, obtains a Decree to foreclоſe, and an Account is taken, *&c.* yet ſuch Decree, *&c.* will not hinder a ſubſequent Incumbrancer from redeeming the firſt Mortgagee, neither ſhall he be concluded by the Account taken in the firſt Suit. 2 *Vern.* 663.

## (C) Concerning Error in the Decree.

1. MAtters aſſigned for Error in a Decree, muſt appear in the Decree it ſelf; for being inrolled, it is ſuch a Record as muſt be tried by it ſelf; but if a Fact be miſtaken at the Hearing and decretal Order, that may be rectified upon a Rehearing. 1 *Chan. Ca.* 54. Vide *Bills of Review and Reverſal, Title* Bill.

2. If a Feme Sole exhibits a Bill, and during the Proceedings marries, and no Notice is taken of it, but the Cauſe proceeds, and there is a Decree for the Defendant; this will not be ſufficient Cauſe to reverſe the Decree, being no Error appearing in the Decree, but a Matter which ſhould have been pleaded in Abatement, and of which the Defendant alone might have taken Advantage. 1 *Chan. Rep.* 231.

3. So if a Mortgagor has a Decree againſt the Mortgagee to have a Redemption, and pending a Reference, the Suit abates by the Death of one of the Parties, Defendants; but the Account goes on, and the Maſter is attended by the Executor of the Party dying, and makes his Report, which is confirmed and decreed; this, after twenty Years, ſhall not be ſufficient Error, ſo as to intitle the Deviſee of the Mortgagor to a new Account. 30 *Car.* 2. between *Slingsby* and *Hale*, 1 *Chan. Ca.* 122.

4. Sir *George Downing* brought an Appeal in the Houſe of Lords from a Decree made in the Court of Chancery, by Conſent, ſuggeſting, that tho' the *Regiſter*, in drawing up the Order, had drawn it as a Decree by Conſent, (and the Minutes were ſo too); yet he never did conſent to ſuch Decree, nor his Counſel neither; or if they did, it was without his Authority, and made Affidavit of it; but the Appeal was diſmiſs'd. *Hill.* 1699. between *Downing* and *Cage.*

5. *John Grice*, by Will, deviſes his Real Eſtate to his Wife for Life, and after to *Thomas* his Son, for ninety-nine Years, if he ſhould ſo long live, charged with the Payment of 500*l.* a-piece to *John* and *Thomas*, the two eldeſt Sons of his Son *Thomas*, at their Age of twenty-one Years, and dies; afterwards *John*, the Grandſon, dies in 1694, an Infant, and Inteſtate; after, in 1698, *Thomas* the Father dies, without taking Adminiſtration to *John* his Son; and this Bill was brought to have an Account and Diſtribution of the Perſonal Eſtate of *John Grice* the Grandfather. *Thomas* the Father, and *John* the Son; and on hearing the Cauſe, the Court had decreed the 500*l.* Legacy, deviſed to *John* the Grandſon, to be diſtributed among his Mother, Brother and Siſters, equally; and a Bill of Review being brought to reverſe this Decree, the firſt Error aſſigned was, that on the Death of *John* the Grandſon, in the Life of *Thomas* his Father, his 500*l.* Legacy veſted in his Father by the Statute of Diſtributions, tho' he took not Adminiſtration to him, and therefore ought not to have been diſtributed as the Perſonal Eſtate of *John* the Grandſon, but as the Perſonal Eſtate of *Thomas* the Father, and then the Mother would be intitled to a Third of it; and it was admitted that it ought to have been ſo; but it was inſiſted that this Error did not appear in the Body of the Decree, as drawn up; for tho' it was laid in the Bill, that the Grandſon died in 1694, and the Father in 1698; and that it is confeſſed in the Anſwer, they died about the Times in the Bill; yet the Defendants being Infants, their Admiſſion is not ſufficient, unleſs proved; and it ſhall be ſuppoſed it was not proved, becauſe, if it had, the Court could not make ſuch a Decree, and the Proofs cannot now be referred to. On the other Side it was ſaid, taking the Facts to be, as it appears on the Decree, as drawn up and inrolled, it is a plain Error, and it muſt be ſo taken now; and the Queſtion is not at preſent, whether an Infant's Admiſſion be good, or not. My Lord *Keeper* held it an Error appearing in the Body of the Decree; ſo the Decree was opened. *Trin.* 1706. between *Grice* and *Goodwin.*

6. There having been a Decree made for a very liberal Allowance for the Maintenance of an Infant out of a Truſt Eſtate, and not according to the Truſt; upon a Rehearing, it was endeavoured to ſet aſide the Decree: But *per Cur'*, where an Infant recovers by Decree of the Court, the Court may, by the Approbation of the Infant's Relations, allot him a Maintenance, tho' no Proviſion in the Truſt for that Purpoſe; and this founded on natural Equity; and tho' in this Caſe the Decree went beyond natural Equity; yet a Decree being made in it, we will not reverſe it, tho' poſſibly we would not have made the Decree. 2 *Vern.* 236.

## (D) Concerning the Performance and Execution of a Decree.

1. THE Lord Chancellor for the Time being, will inforce the Execution of Decrees, tho' made by a prior Lord Chancellor; and tho' they are alledged to be unreaſonable, yet will aſſiſt with the utmoſt Proceſs of the Court till they come regularly before him to be reverſed. 2 *Chan. Rep.* 127.

2. If by Decree Mortgage-money is to be paid at a certain Time, yet in Caſe of inevitable Neceſſity, the Court may inlarge the Time, tho' the Decree be ſigned and inrolled. 1 *Chan. Ca.* 64.

3. But where the Court had decreed, that either the Defendant ſhould pay a Sum of Money by a Time therein for that Purpoſe limited, or that in Default thereof, that the Plaintiff ſhould hold and enjoy the Lands charged therewith; and a Writ of Execution of the Decree had iſſued, and an Attachment for Non-performance thereof; and upon the Return of the Attachment, the Defendant moved he might appear and be examined; and it was inſiſted he ought to be admitted thereto, for that he might ſhew that the Proceſs iſſued not regularly, or that he had paid the Money, or had a Releaſe, *&c.* But the *Maſter* of the *Rolls* ordered the Proceſs to go on, and would not admit the Defendant to appear to be examined, unleſs he would give Security to perform the Decree. *Mich.* 1688. between *Roper* and *Roper*, 2 *Vern.* 91.

4. The late Lord *Allington*'s Eſtate was decreed to be ſold for Payment of his Debts and Legacies, and that all Parties intereſted ſhould join in the Sale; and accordingly the Eſtate (being about 2000 *l. per Ann.*) was ſold to *J. S.* and Conveyances executed, in which there was a Covenant for farther Aſſurance; afterwards *J. S.* ſold away 1600 *l. per Ann.* of the Eſtate to another Perſon, and was conſtrained to deliver all the Deeds to him, ſo that he had none left to make out any Title to the 400 *l. per Annum*, that remained unſold; and therefore moved the Court, that the Parties to the Conveyance to him, might be ordered to execute a Duplicate of the Conveyance to be kept by him; they refuſing to do ſo on the firſt Motion; My Lord Keeper ſaid, he looked upon it to be within the Covenant for further Aſſurance; and ordered that a Duplicate ſhould be executed, but that it ſhould be indorſed on it, that it was only a Duplicate; but the Matter being moved again by the other Side, the Order was diſcharged; for that the Decree being once executed, the Court had no more to do in it. *Mich.* 1700. between *Napper* and Lord *Allington*.

*That a Decree is equal to a Judgment, and to be paid accordingly in a Courſe of Adminiſtration*, vide *Title* Creditor *and* Debtor; *that the Benefit of it ſurvives to the Wife*, vide *Title* Baron *and* Feme.



CAP. XXV.

# CAP. XXV.

# Deeds, and other Writings.

(A) Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.

(B) Of suppressing and cancelling Deeds and Writings, and the Consequence thereof.

(C) Deeds, and other Instruments entered into by Fraud, &c. in what Cases to be relieved against.

(D) Defect in a voluntary Deed, in what Cases aided in Equity.

## (A) Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.

1. THE Plaintiff was a Remainder-man in Tail in a voluntary Settlement, and the Bill was for a Discovery of the Deed; but it appearing to the Court, that the Intail was discontinued, the Court would not relieve the Plaintiff. *Hill.* 1688. between *Kelly* and *Berry*, 2 *Vern.* 35. Vide *Bills of Discovery*, Title *Bill.*

2. So where a Bill was exhibited to discover an antient Deed of Intail, alledged to be in the Defendant's Hands, and the Defendant pleaded a Conveyance made to himself of the Estate in Question; and that, if there was any such Intail, the same was discontinued; and the Court allowed the Plea, and said, they would not aid the Issue in Tail against a Discontinuance, tho' by a voluntary Conveyance. *Pasch.* 1688. between *Bunce* and *Phillips*, 2 *Vern.* 50. Where Affidavit must be made, that the Party who prays a Discovery of a Deed, *&c.* has it not in his Possession, *vide* Title *Affidavit*, Letter (A).

3. If an Heir at Law brings a Bill for Deeds and Writings against the Widow of his Ancestor, he must establish her Jointure, though it was made after the Marriage, and not pursuant to any Marriage-Articles

Articles, but purely voluntary. 1 *Vern.* 479, 480, *per Curiam, vide* 2 *Chan. Ca.* 4.

4. *A.* brought a Bill againſt one who was Aſſignee of a Leaſe, and charged, that the Defendant knew that the Leaſe was expired, and that the ſame did appear by Writings in his Cuſtody. The Defendant pleaded that he was Purchaſer of the Leaſe, and that at the Time of the Purchaſe he was informed, that there were fifty-ſeven Years to come in the Leaſe, and therefore gave after the Rate of nineteen Years Purchaſe for it; and the Plea was allowed. 2 *Vern.* 255.

5. A Bill was exhibited for a Diſcovery, whether in a Mortgage made by *A.* to *B.* which had been aſſigned to the Defendant, there was not ſome Truſt declared for the Benefit of the Plaintiff. The Defendant, by Anſwer, denied there was any Truſt declared for the Plaintiff; and the Anſwer being replied to, the Queſtion at the Hearing was, whether the Defendant ſhould be obliged to produce the Deed; and the Lord *Keeper* ſaid, he would not oblige him; for by this Method all Purchaſers might be blown up. But the Reporter adds a *Q. tamen.* 2 *Vern.* 463. *For this* vide *how far Purchaſers without Notice are favoured*, Title *Purchaſe.*

6. If there be a Deed of Settlement, under which two Perſons claim, the Court will (*a*) order it to be brought into Court for its ſafer Cuſtody, and both Parties to uſe it as they have occaſion, and take Copies of it, if they pleaſe. 2 *Chan. Ca.* 42.

(*a*) If a Man ſeiſed of Lands in Fee hath divers Charters, Deeds and Evidences, and maketh a Feoffment in Fee, either without a Warranty, or with Warranty only againſt him and his Heirs, the Purchaſer ſhall have all the Charters, Deeds and Evidences, as incident to the Lands & *ratione Terræ*, to the End he may the better defend the Land himſelf, having no Warranty to recover in Value; for the Evidences are as it were the Sinews of the Land, and the Feoffor not being bound to Warranty hath no Uſe of them; but if the Feoffor be bound to Warranty, ſo that he is bound to render in Value, then is the Defence of the Title at his Peril; and therefore the Feoffee in that Caſe ſhall have no Deeds that comprehend Warranty, whereof the Feoffor may take Advantage; alſo he ſhall have ſuch Charters as may ſerve him to deraign the Warranty Paramount; alſo he ſhall have all Deeds and Evidences which are material for the Maintenance of the Title of the Land; but other Evidences which concern the Poſſeſſion, and not the Title of the Land, the Feoffee ſhall have them. *Co. Lit.* 6. *a.* 1 *Co.* 1, 2.

7. *A.* on the Marriage of his Son, ſettled ſeveral Lands in this Manner, *viz.* as to Part, to the Uſe of himſelf for Life, and after to the Uſe of his Son for Life, then to his firſt and other Sons in Tail, and for Want of ſuch Iſſue, to the Uſe of the Plaintiff, who was his Brother, and his Heirs; and as to the other Part of the Lands, to the Uſe of the Son for Life, and after to the Uſe of the Wife for her Jointure, then to the firſt and other Sons in Tail; and for Want of ſuch Iſſue, to the Plaintiff and his Heirs; the Son and Wife died without Iſſue in the Life-time of *A.* and after their Deaths *A.* got the Settlement and cut it in Pieces; but the Counterpart was intire, and in the Hands of *A.* and the Bill was brought to diſcover it, and have it preſerved; and the Counterpart being confeſſed in the Anſwer, the Plaintiff obtained an Order at the *Rolls* to have it brought into Court; and a Motion was made to have that Order diſcharged, for that the Remainder to the Plaintiff was meerly voluntary, and therefore he ought not to have any Aid from a Court of Equity; but the Court would not diſcharge the Order, but made the Deed be brought into Court, there to remain, and thereby hinder *A.* from ſelling the Eſtate from the Plaintiff. *Trin.* 1691. between *Brookbank* and *Brookbank.*

## (B) Of ſuppreſſing and cancelling Deeds and Writings, and the Conſequence thereof.

1. *A.* Suppreſſed a Marriage-Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father; and all the prior Eſtates being ſpent; upon Proof made, that the Settlement came to the Defendant's Hand, and that he had confeſſed it in Anſwer to a former Bill, tho' he now denied it; the Maſter of the *Rolls* decreed the Plaintiff ſhould hold and enjoy the Eſtate, and this Decree was confirmed by my Lord *Keeper*. *Trin.* 1700. between *Eyton* and *Eyton*, 2 *Vern.* 380.

2. So where a Perſon confeſſed, that he in a Paſſion had burnt his Marriage-Articles; but it being made appear, that he produced them at the Execution of a Commiſſion ſubſequent in Time to the Day on which he pretended to have burnt them, he was committed to the *Fleet*, until he ſhould produce them; and altho' he afterwards made Oath he had them not, and could not produce them, and that it was inſiſted for him, that altho' the Burning of the Articles was a great Miſdemeanor, yet a Man was not to ſuffer perpetual Impriſonment, becauſe he could not do what was impoſſible for him to do; yet he could not be diſcharged until he had conſented to admit the Articles were to the Effect in the Bill. *Trin.* 1706. between *Sampſon* and *Ramſey*, 2 *Vern.* 561. *vid.* 1 *Chanc. Ca.* 292, 293, *S. P.*

3. If *A.* on his Marriage with *B.* ſettles Lands on her for a Jointure, which were ſubject to an Intail, and *C.* the Brother of *A.* is privy to the Intail, and ingroſſes the Jointure-Deed, and has the Deed of Intail in his Cuſtody, and owns that he cancelled it, being under an Apprehenſion that *A.* would dock the Intail, and *A.* deviſes the Inheritance to *J. S.* and dies without Iſſue, tho *C.* recovers in Ejectment on the Deed of Intail; yet Equity will decree the Widow her Jointure; but *J. S.* being a voluntary Deviſee, can have no Relief. *Mich.* 1691. between *Rawe* and *Pole*, 2 *Vern.* 239. decreed and affirmed in the Houſe of Lords. *Vid.* Title *Notice.*

## (C) Deeds, and other Inſtruments entred into by Fraud, &c. in what Caſes to be (*a*) relieved againſt.

(*a*) For this *vid.* Title *Agreements.*

1. *A.* For 300 *l.* granted to the Defendant *B.* a Rent-Charge of 300 *l. per Ann.* out of Lands in *Ireland* of 1000 *l. per Ann.* to hold to *B.* and his Heirs, to commence from the firſt *Michaelmas* or *Lady-Day*, after the Death of *A.* without Iſſue Male, with a Proviſo, if the ſaid *A.* had any Iſſue Male, who ſhould attain the Age of twenty-one Years, the Grant ſhould be void; *A.* died without Iſſue, and on a Bill to be relieved againſt this Rent-charge, the Court decreed a Reconveyance or Leaſe thereof on Payment of the 300 *l.* and Intereſt; it appearing in the Cauſe by Proof, that *A.* was young and neceſſitous, and had lived an idle diſſolute Life, and that the Debaucheries, in which *B.* was often a Companion with him, would ſoon end his Days; that he made this Bargain without the Advice of

any Friends or Counſel of his own; and that he was utterly incapable of getting Children, as appeared by the Oaths of his Surgeons. *Paſch.* 1684. between the *Earl* of *Ardglaſſe* and *Muſchamp*, 1 *Vern.* 237.

2. But where *A.* had an *Inn* in *Newcaſtle* deſcended to him, which was let at 64 *l. per Ann.* but ſubject to a ſmall Mortgage, and *A.* being very Poor, was inveigled to ſell it for 80 *l.* and afterwards brought a Bill to be relieved, but was diſmiſſed: My Lord Chancellor declaring, that tho' the Bargain was not a fair one; yet as it was not attended with ſtrong Badges of Fraud, there could be no Relief againſt it. *Mich.* 1702. between *Wood* and *Fenwick*.

3. If a Bond be entred into by Force and Terror, but ſo as not to make it *Dureſs*, the Court may relieve againſt it, at leaſt not ſuffer it to be carried into Execution in Equity. 2 *Vern.* 497. *per Curiam.*

4. A Man poſſeſſed of a Leaſe for three Lives of a Rectory, deviſed the Rectory by his Laſt Will; but that being void, it came to his three Daughters, as Coheirs and ſpecial Occupants: There being a Suit in *Chancery*, the Husband of one of the Daughters, fearing to be in Law, and being made to believe that he ſhould be forced to pay the Coſts, releaſed the Arrears that ſhould be coming to him for his Share of the Rectory to the other Siſters, who were to bear the Charge of the Suit; and his Share of the Arrears amounting to 1000 *l.* the Releaſe was ſet aſide, it being a Miſapprehenſion in him. *Hill.* 1681. between *Gee* and *Spencer*, 1 *Vern.* 32. *vid.* 1 *Vern.* 20. where it is declared by my Lord *Chancellor*, to be the conſtant Rule in Equity, to avoid (*a*) a Releaſe, where there is *Suppreſſio Veri*, or *Suggeſtio Falſi*.

(*a*) *A.* had a Judgment of 6000 *l.* againſt *B.* *B.* gave *A.* a Legacy of 5 *l.* and died, *A.* on Receipt of this 5 *l.* gave the Executor of *B.* a Releaſe in this Manner: *I acknowledge to have received of* C. 5 *l. left me as a Legacy by* B. *and do releaſe to him all Demands which I againſt him, as Executor of* B. *can have, for any Matter whatſoever*; and it was adjudged, that the Generality of the Words, *All Demands*, ſhould be reſtrained by the particular Occaſion mentioned in the former Part thereof, *viz.* the Receipt of the 5 *l.* Legacy, and ſhould not be a Diſcharge of the Judgment. *Paſch.* 1 *W.* & *M.* between *Knight* and *Cole*, 1 *Lev.* 101. adjudged.

## (D) Defect in a voluntary Deed, in what Caſes aided in Equity.

1. *A.* Having two Nephews, who were his Heirs at Law, by Conveyance executed in his Life-time, ſettled all the Lands to the Uſe of himſelf for Life, Remainder to his Iſſue, if he ſhould happen to have any, Remainder to his Nephews; but in the Enumeration of the Particulars of the Lands, a Miſtake was made; but the Conveyance being meerly voluntary, the Court refuſed to amend it, but left the Lands to deſcend equally between them. 1 *Vern.* 37, 38.

2. But if a Man makes a voluntary Settlement as a Proviſion for his younger Children, and for their Maintenance, ſuch voluntary Conveyance ſhall be ſupplied and made good in Equity. 1 *Vern.* 40. *vid.* 2 *Vern.* 475. That if there are two voluntary Deeds or Conveyances, the Firſt ſhall prevail: And *vid.* Title *Agreements*, Letter (C).

# CAP. XXVI.

## Deviſes.

(A) Of Deviſes, by whom and to whom.
(B) Of what Eſtate or Intereſt in the Deviſor may be diſpoſe.
(C) What Words paſs a Fee in a Will.
(D) What Words paſs an Eſtate-tail and for Life.
(E) Of Executory Deviſes of Lands of Inheritance, and here of Contingent Remainders and Croſs Remainders, as far as they relate to this Place.
(F) Of Executory Deviſes of Leaſes for Years, and here of the Limitation of the Truſt of a Term, as far as it relates to and agrees with the Deviſe thereof.
(G) Of Terms for Years and incertain Intereſts by Deviſe.
(H) Of Deviſes by Implication.
(I) Of Deviſes of Lands for Payment of Debts.
(K) Of Deviſes of Things Perſonal, as Goods, Chattels, &c. by what Deſcription, and to whom good.
(L) Where a Deviſe ſhall be in Satisfaction of a Thing due.
(M) Of Void Deviſes.

1*ſt*, By deviſing what the Law already gives, or what the Policy of the Law will not admit.
2*dly*, By Uncertainty in the Deſcription of the Thing deviſed.
3*dly*, By Uncertainty in the Deſcription of the Perſon to take.
4*thly*, By the Deviſee of Lands dying in the Life-time of the Deviſor.

*What Circumſtances are Neceſſary by the* 32 & 34 H. 8. & 29 Car. 2. *what ſhall be a Revocation and a New Publication*, vide Tit. *Will*.

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### (A) Of Deviſes, by whom and to whom.

1. A Wife, whoſe Husband is baniſhed for his Life by Act of Parliament, may (*a*) make a Will, and in every Thing act as a *Feme Sole*, as if the Husband was dead. *Trin.* 1689. between the Counteſs of *Portland* and *Prodgers*, 2 *Vern.* 104.

(*a*) By 34 & 35 H. 8. it is declared in expreſs Words, that a Deviſe of any Manors, Lands, &c. by a Feme Covert, Infant, Ideot, or *non Compos*, is not good; that ſuch only, who have

have a ſound and diſpoſing Memory, can deviſe, *vid.* 6 *Co.* 23. *a. Cro. Jac.* 497. and that it is not ſufficient that they be able to anſwer to familiar and uſual Queſtions. If a Man makes a Will in his Sickneſs by the over Importunity of his Wife, to the end he may be quiet, this ſhall be ſaid to be a Will made by Reſtraint, and ſhall not be good. *Styl.* 427.

104. and the Legatees under the Lady *Sandys*'s Will, whoſe Husband was ſo baniſhed, were decreed their Legacies.

(*b*) The Huſband may bind himſelf by Covenant or Bond to permit his Wife by Will to diſpoſe of Legacies, *&c.* and this will be ſuch an Appointment as the Huſband will be bound to perform, *Cro. Eliz.* 27. *Cro. Car.* 219, 376, 597. but it does not operate as a Will, neither ought it to be proved in the Spiritual Court. 1 *Mod.* 211, 212. For the Property paſſes from him to her Legatee, and it is his Gift. 1 *Mod.* 211. *per Curiam.* If he once aſſents, he cannot after diſſent; and where he is bound by Agreement to let her make a Will, his Conſent ſhall be implied till the Contrary appears; and what ſhall be a ſufficient Evidence to an Aſſent, *vid.* 2 *Mod.* 172, 173. What Religious Perſons were diſabled from making a Will, *vide Roll. Abr.* 608.

2. A Feme Covert Executrix cannot deviſe any of the Goods which ſhe hath as Executrix, without the Aſſent of the Husband or his (*b*) Agreement after. 1 *Roll. Abr.* 608.

3. If a Feme Covert makes and publiſhes her Will, and deviſes Land by it, and her Husband dies, and then ſhe dies, the Deviſe is void becauſe the Conſummation is founded upon the Making and Publiſhing, which are void Acts. *Plow.* 344.

(*c*) For this, *vid. And.* 182. *Dyer* 143. *Raym.* 84.

4. So if one, being under the Age of 21 Years, makes his Will, and thereby deviſes his Lands, and after attains the Age of 21 Years, and dies without making any new Publication thereof, this Deviſe is (*c*) void. *Mich.* 15 *Car.* 2. between *Herbert* and *Forbale*, 1 *Sid.* 162. agreed *per Curiam*, upon a Trial at Bar.

(*d*) Some Books mention the Age of 17, others that an Infant may make his Teſtament, and conſtitute his Executors for his Goods and Chattels at 18. *Co. Lit.* but as the Commom Law hath appointed no Time, it therefore depends wholly on the Spiritual Court. 2 *Mod.* 315. *per Curiam*; and it was ſaid, that they ſometimes allowed Wills made by Perſons of Fourteen Years of Age; but however it being a Matter within their Juriſdiction, the Courts of Law will not intermeddle. 2 *Mod.* 315. 2 *Jones* 210.

5. But an Infant Male at the (*d*) Age of Fifteen, or Female at Twelve, if proved to be of Diſcretion, may make a Will of their Perſonal Eſtate, and it ſhall be good; agreed by Counſel, and admitted by the Court. 2 *Vern.* 469.

(*e*) Becauſe at Common Law it was only a Poſſibility, and not grantable or deviſeable; but whether ſuch a Reverſion could be deviſed by Parol within the Cuſtom, *vid. Styl.* 409, 410. *Dubitatur*, and there ſaid, that the Statute of *Weſtminſter* 2. helped not the Cuſtom.

6. Tenant in Tail to him and the Heirs of his Body, with the Reverſion expectant in Fee, cannot deviſe the Land in Fee to another, though he dies without Iſſue. 31 *Aſſ.* 3. (*e*) adjudged. *Quære Rationem.*

7. Tenant in Tail may deviſe Lands to a Charity, and ſuch Deviſe ſhall be good, tho' there was neither Fine levied, or Recovery ſuffered of the Lands. *Duke's Char. Uſes* 110. 2 *Vern.* 453. *S. P.* decreed.

8. If there be two Jointenants of Lands, and one of them deviſes that which belongs to him, and dies, this is a void Deviſe, and the Deviſee takes nothing, becauſe the Deviſe does not take Effect till after the Death of the Deviſor; and then the Surviving Jointenant takes the whole by a prior Title, *viz.* from the firſt Feoffment; but in this Caſe, if the Deviſor ſurvives the other Jointenant, then the Deviſe is good for the Whole, becauſe he being the ſurviving Jointenant has the whole by Survivorſhip, and then the

Words of the Will are ſufficient to carry the whole Eſtate; beſides at the Time of making the Will, tho' he was not ſole Tenant of the Land, yet he was ſeiſed *per moy & per tout*; and it is impoſſible to fix upon any particular Part which he meant to deviſe, becauſe he could not then call one Part of the Land more his own than another; and the moſt genuine Conſtruction ſeems to give the whole Land, ſince he was ſeiſed *per tout* of it at the Time of the Deviſe. *Lit. Sect.* 287. *Perkins Sect.* 500.

9. A Wife may be a Deviſee, tho' not a Grantee to the Husband; for as the Grant had been void, becauſe the Husband and Wife are but one Perſon in Law, ſo the Deviſe is good, becauſe it does not take Effect till after the Death of the Husband, and then they are no more one Perſon. *Co. Lit.* 112. 1 *Roll. Abr.* 610.

10. A Deviſe to the Principal, Fellows and Scholars of *Jeſus College* in *Oxford*, and their Succeſſors, for Maintenance of a Scholar, is good by the Statute of Charitable Uſes, tho' ſuch Deviſe had been *Mortmain* by the Statute of Wills *Hob.* 136. *Flood's* Caſe. *Vid.* Tit. *Charity.*

11. A Man might have deviſed to an Infant *in Ventre ſa mere*, tho' the Deviſor died before the Infant was born, for he was in *Eſſe* in ſome Reſpect, and the Freehold ſhall be in the Heir in the mean Time; (g) *Dubitatur.* 11 *H.* 6. 13.

(g) Whether a Deviſe to an Infant *in Ventre ſa mere per verba in Præſenti* be good, has been much doubted, becauſe it is not to take Effect at the Time of the Death of the Deviſor; and ſince by the Deviſe he is to take immediately after the Death of the Deviſor, the Freehold cannot be in Abeyance by the Act of the Parties; but as the better Opinion ſeems to be that ſuch a Deviſe is good, it will be ſufficient barely to mention the Authorities *pro* and *con.* as *Dyer* 303. 2 *Mod.* 9. 1 *Lev.* 135. *Moor* 177. *Pl.* 312, 220. *Raym.* 163. 1 *Keb.* 851. 2 *Bulſt.* 273. 1 *Rol. Rep.* 110, 137. 2 *Rol. Rep.* 335. *Raym.* 83. *Carter* 5, 87. 2 *Mod.* 292. And by *Finch* L. Keeper, the Doubt ariſes upon the Statute of Wills, which enacts that it may be lawful to deviſe to any Perſon or Perſons, *&c.* but that at Common Law without Queſtion it was good. 2 *Mod.* 9. but a Man cannot ſurrender a Copyhold to an Infant *in Vantre ſa mere.* 1 *Rol. Rep.* 109, 137, 254. 2 *Bulſt.* 272.

12. A Deviſe to an Infant *in Ventre ſa mere*, when he is born, is undoubtedly good, and the Freehold ſhall deſcend in the mean Time. 1 *Lev.* 135. 1 *Roll. Abr.* 609.

13. So is a Deviſe to an Infant *in Ventre ſa mere*, with a new Publication of the Will after his Birth. *Cro. Eliz.* 423.

14. So if Lands be deviſed to *A.* for Life, the Remainder to a Poſthumous Child, this is a good contingent Remainder, becauſe there is a Perſon in Being to take the Particular Eſtate; and if the Contingent Remainder veſts during the Continuance of the particular Eſtate, or *eo Inſtante* that it determines, it is ſufficient. *Moor* 637. *vid.* 3 *Lev.* 408. 4 *Mod.* 259, 282. the Caſe of *Reve* and *Long*, and *vid.* 10 & 11 *W.* 3. *cap.* 16. whereby Proviſion is made for preſerving Remainders for the Benefit of Poſthumous Children.

15. If Lands are deviſed to two Men, and the Child with which the Deviſor's Child is *enſient*, the Child ſhall take by the Deviſe, but whether jointly or in Common, *Quære. Moor* 177.

16. A Baſtard may be a Deviſee of Land, but a Monk cannot. *Dyer* 323.

## (B) Of what (a) Eſtate or Intereſt in the Deviſor may he diſpoſe.

(a) By the Common Law no Lands or Tenementswere deviſeableby any laſt Will orTeſtament, neithercould theybetranſferred from one to another, but by ſolemn Livery and Seiſin, Matter of Record, or ſufficient Writing. *Co. Lit.* 111. *b.* The Reaſon of this is owing to the Nature of the old Feuds and Tenures; for if this were permitted, the Lord would be diſappointed, not only of the Profits of *Ward*, *Marriage* and *Relief*; but likewiſe it would be in the Power of his Tenant, by deviſing to a Stranger to put on him a Perſon, who had neither Ability of Mind, or Strength of Body; tho' the one was requiſite to aſſiſt him in his Courts, and the other to defend his Perſon in the Field. (b) If a Stranger diſſeiſes the Deviſor, if he dies before Re-entry, the Deviſe is void, 39 *H.* 6. 18. *b.* but if he re-enters, the Deviſe ſhall be good, for he was ſeiſed *ab initio.* 1 *Salk.* 238.

1. IF the Father deviſes Lands to his youngeſt Son, and the eldeſt Son knowing thereof enters into the Land, and diſſeiſes the Father, and ſo continues till the Death of the Father, by which the Will is (b) void; yet becauſe it was made void by Deceit and Covin, it ſhall be made good in Chancery; *per* Lord Chancellor, in *Roſſwell* and *Emry*'s Caſe, 1 *Rol. Abr.* 378.

(c) If a Man deviſe Lands in which he has nothing, and after purchaſes them, ſuch a Deviſe is void, not being within the Statute of Wills, for he is not a Perſon having. *Plow.* 348. So where a Man deviſed to his Wife all ſuch Sums of Money, Lands, Tenements, and Eſtate whatſoever, whereof at the Time of his Deceaſe he ſhould be poſſeſſed; and after the making of the Will, he purchaſed Lands of the Cuſtom of Gavelkind, and died without making any Publication; and it was held, that theſe Purchaſed Lands did not paſs, for they were not *ſua* at the Time of the making of the Will; and the conſtant Form of Pleading is, that the Teſtator was ſeiſed, and that being ſo ſeiſed, &c. which at leaſt is an Evidence of the Law; and there is no Difference as to Lands deviſeable by Cuſtom or by Statute; but ſuch Deviſe of Things Perſonal is good, tho' the Teſtator had them not at the Time of making his Will, becauſe they go to the Executor, and paſs not by the Will, but by the Aſſent of the Executor to whom the Will is only directory: Adjudged *Mich.* 6 *Ann.* in B. *R.* on a Writ of Error out of the *C. B.* and confirmed alſo on a Writ of Error in the Houſe of Lords, between *Bunter* and *Cooke.* 1 *Salk.* 237, 238.

2. If *A.* articles for the Purchaſe of Lands, but before any Conveyance executed, he deviſes all his Lands to be ſold for the Payment of his Debts and Legacies; theſe Lands will paſs, altho' he was not ſeiſed at the (c) Time of the Will, and tho' there was no new Publication: So if a Man deviſes all his Lands for Payment of his Debts, and afterwards purchaſes Land, Equity will decree a Sale of the purchaſed Lands, altho' there were no precedent Articles. *Trin.* 35 *Car.* 2. between *Prideux* and *Gibbon*, 2 *Chanc. Ca.* 144.

3. If *A.* purchaſes Copyhold Lands, and dies before Admittance, having firſt deviſed all his Copholds to *T. S.* the Copyhold Lands contracted for will paſs by the Will; or in any Caſe, if there are Articles for a Purchaſe, and the Purchaſer makes his Will, and dies before any Conveyance executed, yet the Lands ſhall paſs in Equity. *Trin.* 15 *Car.* between *Davie* and *Readſham*, 1 *Chan. Ca.* 39.

4. *A.* employs *B.* to article for the Purchaſe of Lands, which *B.* did, and the Articles were made in *April*, but the Poſſeſſion was not to be delivered till the *Michaelmas* following; *A.* before *Michaelmas*, or a Conveyance executed, but after Payment of the Purchaſe Money deviſed by ſufficient Words to *J. S.* and afterwards *A.* takes a Conveyance of the Lands ſo articled for, to him and his Heirs, and died; and it was held, that the Land paſſed by the Will, and that an equitable Intereſt is as well deviſable, as a legal Eſtate. *Hill.* 1711. between *Greenhil* and *Greenhil*, 2 *Vern.* 679. The Reporter adds a *Quære*, whether the Teſtator after the Date of the Will,

having taken a Conveyance to himſelf and his Heirs, it did not amount to a Revocation.

5. On a Treaty of Marriage, Articles were entred into, whereby the Sum of 700 *l.* being the Wife's Portion, and 700 *l.* more added to it on the Part of the Husband, in all 1400 *l.* was agreed to be laid out in the Purchaſe of Lands, to be ſettled on the Husband for Life, Remainder to the Wife for Life, Remainder to Truſtees, to ſupport Contingent Remainders, *&c.* the Marriage takes Effect, the Husband dies without Iſſue, and before any purchaſe made purſuant to the Articles, having firſt deviſed all his Perſonal Eſtate to the Defendant, who was his Wife, and all his real Eſtate to the Plaintiffs, who were his Nephews, and one of them his Heir at Law, and made his Wife Executrix, but took no manner of Notice of the 1400 *l.* on a Bill brought by the Plaintiffs to have this 1400 *l.* as they would have the Land, if the Purchaſe had been made purſuant to the Articles; for the Wife took more by the Deviſe, than ſhe would be intitled to under the Settlement, had it been made; and therefore it was agreed, that if it were to be conſidered as Lands, ſhe could not have both, the Deviſe of the perſonal Eſtate being more than an Equivalent, and therefore a Satisfaction. And it was held by my Lord Chancellor, that as this Caſe is, if a Purchaſe had been made, even after the making this Will, tho' at Law ſuch Lands would not paſs, yet in this Court there could be no Queſtion, but the Plaintiffs would have the Benefit thereof by the Relation to the Articles; and tho' no Purchaſe was made, yet by the Agreement, the 1400 *l.* is to be looked upon in a Court of Equity as a real Eſtate, and as ſuch muſt go to the Plaintiffs; and decreed accordingly *per Harcourt* Lord Chancellor, and affirmed by my Lord *Cowper*, *Paſch.* 1715. between *Lingen* and *Souray*.

6. A Man ſeiſed in a Fee deviſed his Lands in Truſt, to ſell Part for Payment of his Debts, and till his Debts were paid, to pay 100 *l. per Ann.* to his natural Daughter *M.* and after the Debts paid, 300 *l.* for her Life; and if ſhe have Children, to convey ſucceſſively to thoſe Children; but if ſhe die without Iſſue, then to convey to the eldeſt Son and Heir of *J. C.* his Nephew, and the Heirs of his eldeſt Son; but if he claim any Thing during the Life of *M.* then both Father and Son to be excluded from having any Thing out of his Eſtate. The eldeſt Son of *J. C.* was *A.* who had two Siſters, *B.* and *T.* *A.* died leaving Iſſue *J.* who in the Life of *M.* deviſed the Lands in Queſtion to *J. S.* and died without Iſſue; and after the Death of *M.* without Iſſue, the Truſtee conveyed to the Siſters of *A.* and their Heirs; and the Queſtion being between the Siſters and the Deviſee of *J.* it was decreed by the Lord *Keeper*, *Treby* Chief Juſtice, and Baron *Powel*, that this being but a meer Poſſibility during the Life of *M.* the Deviſe was void, and the Lands well conveyed to the Siſters *B.* and *T.* *Trin.* 7 *W.* 3. between *Biſhop* and *Fountain*, 3 *Lev.* 427, 428.

7. *J. S.* who was to have had a conſiderable Advantage by a Will, was drawn in by Fraud and Falſe Suggeſtions, to make a Compoſition for his Intereſt, and to give a Releaſe; afterwards *J. S.* being ſenſible of the Fraud, makes his Will, and thereby (after other Legacies) he deviſes all the reſt of his Goods and Chattels whatſoever to his Wife, upon Condition, that ſhe paid all his Debts, and made her ſole Executrix; and it was held, that his Right to ſet aſide

aſide the Releaſe was deviſeable, and the Words proper for that Purpoſe: Decreed *Trin.* 1701. between *Drew* and *Merry*.

## (C) What Words paſs a Fee in a Will.

1. IF *A.* deviſes Land to *B.* to give, ſell, or do what he pleaſes with it, theſe Words by the (*a*) Intent of the Deviſor, convey a Fee to *B.* or if the Words were to *B. & ſanguini ſuo*, they would paſs a Fee, becauſe the Blood runs through the Collateral, as well as Lineal Line. *Co. Lit.* 9. *b. Benl.* 11. 1 *Rol. Abr.* 834.

(*a*) Tho' a ſet Form of Words, and the Word *Heirs* particularly, are neceſſary in Deeds to convey an Inheritance, yet may they be diſpenſed with in laſt Wills, at which Time it is preſumed, that the Teſtator is *Inops Conſilii*; and therefore, if a Man deviſes Lands to another *in Perpetuum*, or *in Feodo Simplici*, or to him and his Aſſigns for ever, or to him and his; or that ſuch a one ſhall be univerſal Heir; in all theſe Caſes a Fee paſſes by the Will; for it is evidently the Deviſor's Intention, that the Gift ſhould continue beyond the Life of the Deviſee. *Co. Lit.* 6. *b.* 1 *Bulſt.* 222. *Bendl.* 11. *Moor* 57.

2. A Deviſe to a Man and his Succeſſors carries a Fee, for by the Word *Succeſſors* is intended Heirs, *quia Hæres ſuccedit Patri.* Cro. Jac. 416. 1 Rol. Abr. 835.

3. If a Deviſe be in theſe Words, I Releaſe all my Lands to *A.* and his Heirs, *A.* has a Fee-ſimple, for where the Intention of conveying appears, the Law diſpenſes with the Form in a Will. *Bendl.* 34.

4. I appoint that *J. S.* ſhall have my Inheritance, if the Law allows it, or that *J. S.* ſhall be Heir of my Lands; theſe Words are ſufficient to convey a Fee. *Hob.* 2.

5. If a Man Deviſes Land to his Wife for Life, and after her Death, to his three Daughters, equally to be divided; and if one dies before the other, then one to be Heir to the other, equally to be divided; this laſt Clauſe gives a Fee to the Daughters; for the Word *Heir* is *Nomen operativum*, and chiefly in a Will ſhall be taken in its full Extent; and then it reaches the moſt remote Heir. 1 *Roll. Abr.* 833.

6. *A.* deviſes Land to his Son and Heir; and if he dies before his Age of 21 Years, and without Iſſue of his Body then living, the Remainder over, he ſurvives the 21 Years, and ſells the Land; and the Sale was adjudged good; for he had a Fee-ſimple preſently, the Eſtate-Tail being to commence upon a ſubſequent Contingency. Between *Collenſon* and *Wright*, 1 *Sid.* 148.

7. If a Man deviſes Lands to *A.* for Life, and after his Deceaſe, the whole Remainder of theſe Lands to *B.* theſe Words paſs a Fee in the Remainder to *B.* Between *Norton* and *Ladd*, 1 *Lut.* 762.

8. If Lands are deviſed to Truſtees, without any Words of Limitation to ſupport the Truſt of Eſtates of Inheritance, they by Implication muſt have an Eſtate of Inheritance ſufficient to ſupport the Truſt; for there is no Difference between a Deviſe to a Man for ever, and to a Man upon Truſts, which may continue for ever: Adjudged in the Caſe of *Shaw* and *Wright*, *Paſch.* 1 *Geo.* 2. in *B. R.*

9. If *A.* deviſes Land to *B.* for Life, the Remainder to *C.* paying ſeveral Sums in Groſs; *C.* hath a Fee, tho' all the Sums together do not amount to the annual Rent of the Land, for the Deviſe ſhall be intended for his Benefit; and if he had only an Eſtate for Life, he might die before he would receive the Legacies out of the

Land, and conſequently be a Loſer; for where there is a Sum in groſs to be paid, then the Deviſee hath a Fee, tho' the Sum be not to the Value of the Land. *Collier*'s Caſe, *6 Co.* 16. *Cro. Eliz.* 378. *Cro. Jac.* 527. *Cro. Car.* 158. *Co. Lit.* 9. *b.* 5 *Co.* 21.

10. So if *A.* deviſes Lands to *B.* in Conſideration that *B.* will releaſe 100 *l.* due to him, to the Executors of *A.* *B.* has a Fee-ſimple upon his Releaſe of the Debt, for the Deviſe ſhall be intended for his Benefit, and an Eſtate for Life might be determined before he could receive 100 *l.* out of the Land. *Bendl.* 15.

11. If a Man deviſes 100 *l.* in Legacies, to be paid within a Year, to ſeveral Perſons, out of Land to the Value of 10 *l.* yearly, and then deviſes the Land to another, the Deviſee has a Fee in the Land; for though the Deviſe be not to him paying 100 *l.* yet ſince he muſt take the Land ſubject to the Charge of the Legacies, he muſt have a Fee to have any Benefit by the Deviſe. 2 *Lev.* 249. *vide* 2 *Salk.* 685. *S. P.*

12. But if *A.* deviſes Lands to *B.* paying ſo much, or ſuch Sums out of the Profits of the Lands, the Deviſee takes but an Eſtate for Life; for altho' he takes the Land charged, yet he is to pay no farther than he receives, and ſo can be no Loſer. *6 Co.* 16. 2 *Mod. Rep.* 25.

Whether the Word *Paying* out of Lands in general, and not mentioning any certain Time, ſo that a Loſs may appear, paſſes a Fee-ſimple, *Q.* & *vide* 2 *Vern.* 106.

13. So if the Deviſe had been to *B.* paying an annual Sum to another, this had been an Eſtate for Life, for he may pay this out of the yearly Profits, without any Loſs to himſelf. *Vide Cro. Car.* 158. 1 *Jon.* 211. 1 *Bulſt.* 194. *Cro. Car.* 416. *Cro. Jac.* 527.

14. If a Man deviſes to his younger Brother all his Lands, Tenements and Hereditaments, and all his Perſonal Eſtate, and whatever elſe he had in the World, and makes him Executor, deſiring him to pay his Debts and Legacies; the Deviſee has a Fee-ſimple by theſe Words: Adjudged on a ſpecial Verdict in *C. B. Hill.* 1713. between *Ackland* and *Ackland*, 2 *Vern.* 687.

15. If a Man deviſes 50 *l.* to be paid in three Months, and all the Reſt and Reſidue of his Real and Perſonal Eſtate whatſoever he gives to his dearly beloved Wife, whom he makes ſole Executrix; by theſe Words, the Wife has a Fee-ſimple in the Lands. Decreed *Mich.* 1706. between *Murray* and *Wiſe*, 2 *Vern.* 564.

16. So where the Teſtator, being ſeiſed of Copyhold and Freehold Lands, deviſed all the Reſt of his Eſtate, whether Freehold or Copyhold, to his Wife and Children, equally to be divided amongſt them; and it was held, that the Word *Eſtate* muſt ſignify the Intereſt he had in the Land, and ſo paſs a Fee. Between *Carter* and *Horner*, 4 *Mod.* 89. for this *vide Stile* 281. 2 *Lev.* 91. 1 *Mod. Rep.* 100. 2 *Chan. Ca.* 262.

17. *A.* deviſed in the following Words, *I give certain Lands to* J. S. and I give to *John* Earl of *B.* my Son-in-Law, 5000 *l.* and all my Mines, all which I give to my ſaid Son-in-Law, his Executors and Aſſigns, together with my Plate and Jewels, and *all other my Eſtate Real and Perſonal*, not otherwiſe diſpoſed of by this my Will, for to be given by him to his Children, as he ſhall think convenient, I ſolely truſting to his Honour and Diſcretion, that he will give them ſuch Proviſion as will be neceſſary; and another Clauſe

was, whereas I have contracted for the Sale of my Fee-farm Rents, my Will is, that if my Debts ſhall not be ſatisfied out of my other Eſtate, my Executors (whereof the Earl was one) ſhall and may ſell ſome Part, or all of them, for Payment of them, notwithſtanding the Rents are not deviſed by this my Laſt Will; and the Queſtion was, whether his Fee-Farm Rents ſhould paſs to the Earl of *B.* and for what Eſtate. *Et per Holt* Ch. Juſt. who delivered the Reſolution of the Court, the Rents paſs by theſe Words, *All my Real and Perſonal Eſtate*, for the Word *Eſtate* is *Genus Generaliſſimum*, and includes all Things Real and Perſonal, and the Fee of the Rents paſſes, at leaſt the whole Eſtate of the Deviſor, for all his Eſtate is a Deſcription of his Fee. Counteſs of *Bridgwater* and Duke of *Bolton*, 1 *Salk.* 236.

18. *J. B.* a young Lady, being in eight Days Time to be married to the Defendant, being taken ill, made her Will, and after ſeveral ſpecifick and pecuniary Legacies, deviſes in theſe Words, *Item, I give and bequeath all my Lands and Eſtate in* Upper Catesby *in* Northamptonſhire, *with all their Appurtenances, to* William Edgworth *of St.* Margaret's *Eſq*; and made him and Mrs. *Rudge* Executors and Reſiduary Legatees, and died ſeiſed of a Real Eſtate of the Value of 200 *l. per Annum*, and poſſeſſed of about 3000 *l.* Perſonal Eſtate, and the Plaintiff's Wife was her Siſter and Heir; and the only Queſtion was, whether the Defendant had an Eſtate in Fee, or only for Life; and it was agreed, that a Deviſe of all her Eſtate would have paſſed a Fee; but a Difference was endeavoured between ſuch a Deviſe of all her Eſtate generally and a Deviſe of all her Eſtate at ſuch a Place; that this was only a Deſcription of the Place where the Eſtate lay, and no Deviſe of the Intereſt which ſhe had in that Eſtate farther than for Life; and it was agreed clearly, that a Deviſe of all her Lands would paſs only an Eſtate for Life, and not the Eſtate in Fee, which ſhe had in thoſe Lands; but the Maſter of the *Rolls* was clear of Opinion, that he had an Eſtate in Fee, becauſe the Lands paſſed by the firſt Words, and the Intereſt in thoſe Lands by the Second; and if the Word *Eſtate* meant nothing more than the Lands, it would be uſeleſs; but if the Deviſe had been of all her Lands or Eſtate at ſuch a Place, he thought that would not have paſſed the Fee, but would have been taken, according to the common Acceptation, for her Lands at ſuch a Place; but as this was, it muſt be a Fee; and decreed accordingly at the *Rolls*. *Paſch.* 1729. between *Barry* and *Edgworth*.

19. But where a Man ſeiſed of *Black-acre* in Fee by Mortgage, which was forfeited, and of *White-acre* as his own Inheritance, deviſed *White-acre* to his Brother, and then deviſed all the Reſidue of his Goods, Leaſes, Mortgages, Eſtates, Debts, Ready Money; and other Goods, whereof he was poſſeſſed, after Debts and Legacies paid, to his Wife, and made her Executrix, and died; and it was held, that this was no Deviſe in Fee to the Wife, of the mortgaged Land, for the Word *Eſtate* is coupled here with Chattels, which intended that he meant only Eſtates for Years; and the rather, becauſe the Words, *whereof he was poſſeſſed*, ſhew, that he intended only to give her Chattels, and the Mortgage-money, and not the Inheritance of the Land. Between *Wilkinſon* and *Merryland*, *Cro. Car.* 447. 1 *Rol. Abr.* 834.

## (D) What Words paſs an Eſtate-tail, and for Life.

1. IF Lands are deviſed to one, and if he die before Iſſue, or if he depart not leaving Iſſue, or if he die not having a Son, all theſe Limitations (*a*) create an Eſtate-tail. 2 *Vern.* 766.

(*a*) Here it muſt be obſerved, that the Intent of the Deviſor will ſupply thoſe Words which are neceſſary in Conveyances at Common Law: As if Lands are deviſed to a Man and his Heirs Males, the Law will give him an Eſtate-tail, and ſupply the Words (*of his Body*); ſo a Deviſe to one and *ſemini ſuo*, creates an Eſtate-tail; but a Deviſe cannot direct an Inheritance to deſcend againſt the Rules of Law; and therefore if *A.* deviſes to *B.* and his Heirs Male, though this is an Eſtate-tail, yet if *B.* has Iſſue a Daughter, who has Iſſue a Son, he ſhall never inherit; for the Rule is, whoever claims as Heir in Tale Male, muſt convey his Deſcent wholly by Heirs Males. *Co. Lit.* 9. *b.* 25, 271. *Hob.* 33. 1 *Vent.* 228.

2. So if a Man deviſes in theſe Words, *And if it pleaſe God to take my Son* R. *before he ſhall have Iſſue of his Body, ſo that the Lands deſcend to his Brother*, this is an Eſtate-tail in *R. Owen* 29.

3. If *A.* deviſes to the eldeſt Son *J. S.* and the Heirs Males of his Body, for the Term of 500 Years; provided, if he, or any of his Iſſue Male alien the Premiſſes, then to remain over, this is an Eſtate-tail, and the Limitation for 500 Years void; for though generally a Deviſe to a Man and the Heirs of his Body, for 1000 Years, is a Term, and not an Inheritance; yet here the Teſtator's Intent was, that it ſhould be an Inheritance; becauſe, by the Proviſo he took Care to advance the Iſſue of *J. S.* but if it ſhould be a Term, then by the Deſcent of the Inheritance on *J. S.* the Term would be merged, and the Iſſues would be unprovided, for *J. S.* might alien the Eſtate. 10 *Rep.* 78. *Moor* 772. *S. C.*

4. *A.* having two Sons, *B.* and *C.* deviſed *Black-acre* to *B.* and his Heirs, and *White-acre* to *C.* and his Heirs; and further willed, that the Survivor of them ſhould be Heir to the other, if either of them died without Iſſue; tho' the firſt Words were ſufficient to paſs an Eſtate in Fee, yet the ſubſequent Words correct them, and paſs only an Eſtate-tail, and the Remainder in Fee was not contingent, but executed, each Son being Tenant in Tail of the Part to him deviſed, with Remainder to the other. *Cro. Jac.* 695.

5. If a Man deviſes Lands to his Wife for Life, and after to her Son *J. S.* and if he dies without Iſſue, having no Son, then the Remainder over; *J. S.* the Son, by this Deviſe, takes an Eſtate in Tale Male; for tho' the Deviſe to the Son, and if he dies without Iſſue, had been a good Tail general, yet when the Deviſor went further, and ſaid, having no Son, he thereby explained what Iſſue he intended ſhould inherit the Land, and limited it to the Iſſue Male. 1 *Roll. Abr.* 837.

6. *A.* ſeiſed of Lands deviſed them to his Wife, if ſhe did not marry; and if ſhe did, then his eldeſt Son preſently after her Deceaſe to enter and hold the Land to him and the Heirs Male of his Body, the Remainder to his other Sons in Tail Male; the Wife did not marry, yet the Court reſolved that the Lands were intailed by the Will, taking the Intention of the Deviſor to be, that the Intail ſhould be created in all Events; but that the eldeſt Son ſhould not enter till after

ter the Deceaſe of the Wife, unleſs in Caſe of her Marriage, and then to enter preſently. Between *Luxford* and *Cheek*, 3 *Lev.* 125.

7. But where *A.* deviſed all his Land to his Wife, until his Son ſhould be twenty-four, and then to his Heirs for ever; and when he came to twenty-four, ſhe ſhould have the third Part for her Life; and if he dies before twenty-four, then ſhe to have all for her Life; and after her Deceaſe, if the Heir has no Iſſue, the Remainder to *B.* the Remainder to the right Heirs of the Deviſor; the Heir came to twenty-four, but no Eſtate-tail was created by the Will; for the Fee-ſimple deſcended to him, and the Limitation was to take place, if he died before the Age of twenty-four, which he did not. *Dyer* 124. *a.* 1 *Roll. Abr.* 839.

8. A Man deviſed all his Fee-ſimple Lands to his Wife for Life, and after her Death to *A. B.* and *C.* his three Daughters, equally to be divided; and if any of them die before the other, then the others to be her Heirs, equally to be divided; and if they all die without Iſſue, then to others named in the Will; and it was adjudged that the Daughters had an Eſtate-tail. *Cro. Jac.* 448. 1 *Roll. Abr.* 836.

9. So where the Deviſe was to a Man and his Heirs, and if he die without Iſſue, that then the Land ſhall go to *A.* and *B.* or the Survivor of them; adjudged an Eſtate-tail in the firſt Deviſee; for in theſe Caſes the Extent of the Word *Heir* is confined to the Deſcendants, or Iſſue of the Deviſee, ſince otherwiſe the Limitation over cannot veſt according to the Intent of the Deviſor, for they will not allow a Limitation of a Fee upon a Fee. 1 *Roll. Abr.* 836. *Moor* 864. *Hob.* 75. *Poll.* 487. *Cro. Jac.* 448.

10. *A.* having Iſſue *B.* and *C.* deviſed ſome of his Land to *B.* his eldeſt Son and the Heirs of his Body, after the Death of his Wife; and if *B.* died, living his Wife, then to *C.* his Son, and deviſed other Lands to his other Son, and the Heirs of his Body; and if he died without Iſſue, then to remain over; *B.* died in the Life of the Wife, and yet it was adjudged that *C.* could not enter into the Land while any Iſſue of *B.* remained; for the Words of the Deviſe, *that if* B. *died, living the Wife*, did not abridge the Eſtate-tail which was given by the former Words, becauſe the Teſtator could not be ſuppoſed to intend to prefer the younger Son before the Iſſue of the Eldeſt, eſpecially when he had in the former Part of the Will ſettled it on the Eldeſt, and made the ſame Proviſion of other Lands the ſame Way, for the younger Son. 1 *Bulſt.* 230, 231.

11. *B.* deviſed Land to *B.* his Son, and if *C.* his Daughter ſurvived *B.* and his Heirs, then ſhe ſhould have the Lands; and it was adjudged that *B.* had but an Eſtate-tail, for the Word *Heirs* muſt be intended Heirs of his Body, for he could not die without collateral Heirs while his Siſter was alive; but if the Will had ſaid, that if *J. S.* a Stranger, ſurvives *B.* and his Heirs, then he ſhould have the Land, there *B.* had a Fee-ſimple, and then the intended Remainder muſt be void, for it is to veſt on a Contingency of *B.*'s Dying without Heirs, which is too diſtant to expect; and the whole Fee-ſimple being in *B.* there can be no preſent Intereſt to veſt in a Stranger. *Cro. Jac.* 415, 416. 1 *Salk.* 233.

12. So where *A.* deviſed to *B.* for his Life, and to his Heirs; and for Want of Heirs of him, to *C.* in the ſame Manner, and for Want of Heirs of him, to *D.* and his Heirs for ever; the Jury found that *B.*

and *C.* were Brothers, and that *D.* was next Couſin and Heir to them, though not mentioned in the Will; and the Court held, that they had but an Eſtate-tail, and the Remainder in Fee to *D.* good; for *D.* being Couſin and Heir to them, proves that he intended Heirs of the Body; *alſo Want of Heirs of him*, are to be taken for Want of Heirs of his Body. Between *Parker* and *Thacker*, 3 *Lev.* 70. 7 *Co.* 4.

13. A Deviſe to *J. S. in perpetuum*, and after his Deceaſe, Remainder to his Heir Male in the ſingular Number, is an Eſtate-tail, for Heir is *nomen Collectivum.* 1 *Bulſt.* 219.

14. If *A.* deviſes to *B.* for his natural Life, and after his Deceaſe he gives the ſame to the Iſſue of his Body lawfully begotten on a ſecond Wife; and for Want of ſuch Iſſue to *J. S.* and his Heirs for ever; provided that *B.* may make a Jointure of all the Premiſſes to ſuch ſecond Wife, which ſhe may enjoy during Life; this is an Eſtate-tail in *B.* for the Word *Iſſue* is *nomen collectivum*, and takes in the whole Generation. Between *King* and *Melling*, 1 *Vent.* 225. 2 *Lev.* 58. *S. C.*

15. But where Lands were deviſed to *A.* and his Wife, and after their Deceaſe to their Children, they having then a Son and a Daughter; it was adjudged that *A.* and his Wife had but an Eſtate for Life, for no greater Eſtate had paſſed at Common Law; and the Intent of the Deviſor muſt plainly appear, or they will never admit of a Conſtruction different from what they would allow in Conveyances executed in the Life-time of the Party; and for that Reaſon, when the Deviſe is to *B.* and his Children, or Iſſue, *B.* having Iſſue at the Time of the Deviſe, it muſt take Effect according to the Rules of the Common Law, and *B.* can have but an Eſtate for Life jointly with his Children; but if *A.* had deviſed his Lands to *B.* and his Children, or Iſſues, and *B.* had none at the Time of the Deviſe, then he takes an Eſtate-tail; for it is plain, by the Intent of the Deviſor, that the Children ſhall have the Land, and they cannot take as immediate Deviſees, for they were not *in eſſe*, nor by Way of Remainder, for the Deviſe was immediately to *B.* and his Children, and they ſhall be taken as Words of (*b*) Limitation, *viz.* as Children of his Body. *Wild's* Caſe, 6 *Co.* 17. *b.*

(*b*) If Lands are deviſed to one without more Words, this paſſes but an Eſtate for Life; ſo if the Deviſe had gone further, to him and his Aſſigns, theſe Words of themſelves had not inlarged the Eſtate. *Co. Lit.* 9 *b.* But tho' an expreſs Eſtate for Life is given to the Anceſtor, with a Limitation to the Heir or Heirs of his Body, or his Iſſue; yet regularly the Anceſtor takes an Eſtate-tail, according to the Rule laid down in *Shelly's* Caſe, 1 *Co.* 99. *viz.* that where the Anceſtor takes an Eſtate of Freehold, a Limitation to his right Heir, or Heirs of his Body, are Words of Limitation, and not of Purchaſe; but the Exceptions to this general Rule will beſt appear by the Caſes themſelves.

16. If a Man deviſes to *A.* for Life, and afterwards to the next Heir Male, and to the Heirs of the Body of ſuch next Heir Male, this is only an Eſtate for Life in *A.* for the Inheritance is limited or grafted on the Eſtate of the Heir in the ſingular Number, and therefore he ſhall take by Purchaſe. *Archer's* Caſe, 1 *Co.* 66.

17. But where a Man deviſed Land to his Son for ever, and after his Deceaſe, the Remainder to his Heir Male for ever, with other Remainders over; this was held an Eſtate-tail in *A.* for tho' the firſt

Deviſe being to him for ever, would give him a Fee-ſimple, yet the ſubſequent Words, to *his Heir Male*, ſhew what Sort of Inheritance the Deviſor intended him; and the Word *Heir* being *nomen collectivum*, is ſufficient in a Will to create an Inheritance. 1 *Bulſt.* 219. 1 *Roll. Abr.* 836.

18. If Lands be deviſed to *A.* and *B.* equally to be divided, they have but an Eſtate for Life, for this can mean no more than that they ſhould ſeverally occupy the Land. *Cro. Eliz.* 330. 1 *Rol. Abr.* 834.

19. *A.* ſeiſed in Fee of a Houſe and Land belonging to it, deviſes the Moiety of the Houſe to his Wife for her Life. *Item*, He deviſes the other Moiety of his Houſe to his ſecond Son. *Item*, He deviſes the ſaid Houſe, and all the Land belonging to it, to his ſecond Son; yet the Son took but an Eſtate for Life, for the ſecond Deviſe to the Son had its Effect, by conveying a Moiety of the Houſe and Land which he had not by the firſt Deviſe; and there are no Words in the Will to create a larger Eſtate. 1 *Rol. Abr.* 834.

20. If a Man deviſes Lands to his three Daughters, equally to be divided between them, and if one of them die before the others, that then the others ſhall be her Heirs; theſe Words give them no Intail, but for Life only, becauſe it is not to them and their Heirs, or Heirs of their Bodies; wherefore they have only an Eſtate for Life, with croſs Remainders of each one's Part to the Survivors for Life. *King* and *Rumbal*, 1 *Rol. Abr.* 836.

21. A Copyholder in Fee ſurrenders to the Uſe of his Will, and by Will deviſes his Copyhold Lands to his Wife; and if ſhe hath Iſſue by the Deviſor, that the Iſſue ſhall have it at his Age of twenty-one Years; and if the Iſſue die before that Age, or before his Wife, *or if ſhe hath no Iſſue*, then ſhe ſhall chooſe two Attornies, and ſhe to make a Bill of Sale of my Lands to her beſt Advantage; and *per Curiam*, ſhe hath only an Eſtate for Life, and having no Iſſue, hath no Intereſt to diſpoſe, but an Authority only to nominate two who ſhall ſell, and the Vendee ſhall be in by the Will. Between *Beal* and *Shepherd*, *Cro. Car.* 199.

22. A Man ſeiſed in Fee made a Settlement of his Lands on *G.* his Son for Life, Remainder to his firſt, *&c.* Son in Tail Male, Reverſion in Fee to himſelf; and afterwards he made his Will as followeth: As touching my Lands and Tenements, my Will is, that if my Son's Wife die, during the Life of her Husband, without Iſſue Male, that then he ſhall have Power to make a Jointure to any other Wife; *and for Want of Iſſue* of his ſaid Son, then the Lands ſhall be and remain to his Son by any other Wife, and his Grandaughter ſhall have 4000 *l. and in Caſe of Failure of Iſſue Male* by his Son *G.* then all his Lands ſhall go to his Grandchildren and their Heirs, Share and Share alike; and the Court held, that it could not be made an Eſtate-tail, by Tacking the Eſtate by the Will to the Eſtate for Life in the Settlement, on Purpoſe to ſupport the contingent Remainder, becauſe the Settlement and Will are two diſtinct Conveyances, and therefore Judgment was given, that this was not an Eſtate-tail. Between *Moor* and *Parker*, 4 *Mod.* 316.

23. One by Will deviſes Lands to *A.* for Life, without Impeachment of Waſte, and in Caſe he ſhall have Iſſue Male, to ſuch Iſſue

Male and his Heirs for ever; and after the Death of *A.* in Caſe he leave no Iſſue Male, to *B.* and his Heirs for ever, and dies; *A.* ſuffers a Common Recovery, and declares the Uſe to himſelf in Fee, and by his Will deviſes it to *C.* in Fee, and dies without Iſſue; and the firſt Queſtion was, whether by this Deviſe *A.* took an Eſtate in Tail Male, or only for Life; and it was held to be but an Eſtate for Life in *A.* 1*ſt*, Becauſe it was deviſed to him expreſly for Life, and that without Impeachment of Waſte; which would have been needleſs if it were an Eſtate-tail. 2*dly*, The Words, *and in Caſe* A. *die without Iſſue Male, or leave no Iſſue*, are not to be taken ſubſtantively and abſolutely, but relatively to what was ſaid before, *viz.* if *A.* die without Iſſue, who ſhall take the Fee as before is appointed; and theſe oblique Words cannot be intended to deſtroy by Implication the Eſtate expreſly deviſed before to the Iſſue Male of *A.* and there is no Uncertainty in theſe Words, to the Iſſue Male, which of them ſhall take, if there be ſeveral; for the eldeſt ſhall take the Fee by Purchaſe; and the Court being ready to give Judgment on this Point, Juſtice *Powel, junior*, ſtarted another, *viz.* Whether theſe Remainders ſhould take Place as executory Deviſes or contingent Remainders; upon which it was twice argued, but before any Judgment, the Parties agreed, according to 3 *Lev.* 431. but in *Salk.* 224. *S. C.* it is ſaid to have been further held, that this Limitation to the Iſſue was not an executory Deviſe, being after a Freehold, but a contingent Remainder, ſo that a poſthumous Son could never take; but there is no Judgment between *Doddington* and *Kime*, 3 *Lev.* 431. 1 *Salk.* 224. but *per Raym.* Ch. Juſt. in the Caſe of *Shaw* and *Weigh*, it was determined, and Judgment entered, *Paſch.* 9 *W.* 3. that it was only an Eſtate for Life; and it was likewiſe decided in the ſame Manner in Chancery, and on Appeal in the Houſe of Lords.

24. *J. S.* deviſed his Eſtate to Truſtees and their Heirs, in Truſt for *A.* for Life, and to his firſt and other Sons in Tail; but in Caſe *A.* died without an Heir Male of his Body begotten, the Truſt to be void, and in ſuch Caſe he gave the Eſtate to the Defendants; and it was held, that theſe Words, *If he die without Heir Male of his Body begotten*, did not give him an Eſtate-tail by Implication, nor inlarge an expreſs Eſtate deviſed to him for Life. Between (*c*) *Bamfield* and *Popham*, 2 *Vern.* 427, 449. *S. C.* 1 *Salk.* 236. *S. C.* but ſtated, that the Deviſe was to *A.* for Life, Remainder to the firſt Son of *A.* in Tail Male, and ſo on to the tenth Son in Tail Male, *&c.* by which if

(*c*) *Note*; The Caſe, as ſtated for the Opinion of the Court of *Common Pleas*, was in the Words following, *viz.* *A.* ſeiſed in Fee of the Lands in Queſtion, *Anno* 1672, made his Laſt Will in Writing, and thereby deviſed the ſaid Lands to certain Perſons therein named, and their Heirs, in Truſt, by Woodſales and Fines for Leaſes, to raiſe Money for the Payment of his Debts; and after his Debts paid, in Truſt for, and for the Uſe of *B.* for his Life; and after his Deceaſe, in Truſt for the Uſe of his firſt Son and the Heirs Males of his Body; and after the Deceaſe of the firſt Son without Heir Male, then in Truſt for ſuch other Son and Sons, and their Heirs Males, as ſhould be begotten by the ſaid *B.* in Seniority one after another; provided that if the ſaid *B.* ſhall die before he come to the Age of 21 Years, or at any Time thereafter, without Heir Male lawfully begotten of his Body, that then the Truſt ſo limited to the ſaid *B.* ſhould be utterly void; and in ſuch Caſe, from and after the Death of the ſaid *B.* without Heir Male by him lawfully begotten, the Truſtees to ſtand ſeiſed to the Uſe of *C.* and his Heirs; the Teſtator afterwards annexed a Codicil in Writing to the ſaid Will, and thereby reciting, that he was minded to make ſome Alterations in his Will, and that he had deviſed all his Real Eſtate to the ſaid *B.* and the Heirs Males of his Body, by the ſaid Codicil declared, that if it ſhould happen that the ſaid Eſtate in Tail ſhould determine by the Death of the ſaid *B.* without Iſſue, before he attain the Age of twenty-one Years, then the ſaid Lands ſhould be enjoyed by the Father of the ſaid *B.* for his Life, to commence from and immediately after the Determination of the ſaid Eſtate in Tail, as aforeſaid: The Teſtator died ſoon after the Making the ſaid Codicil; the Truſt, as to the Payment of Debts, is performed, and *B.* entered on the Premiſſes; and now enjoys them. *Q.* What Eſtate *B.* hath by the ſaid Will and Codicil: *Note*; *B.* is Couſin and Heir to *A.* the Deviſor,

Deviſor; and it was certified by

if there had been more than ten Sons, they muſt be excluded; if it were conſtrued and eſteemed an Eſtate for Life in *A.*

the unanimous Opinion of the Court, that *B.* had but an Eſtate for Life; which was accordingly decreed by my Lord Keeper *Wright*, aſſiſted by *Holt* and *Trevor* C. Juſt. and *Powel* Juſt. *Mich.* 1703. and the Caſes cited were *Moor* 611. *Yelv.* 19. 30 *Ed.* 3. 18. *Plunkett* and *Holmes*, 1 *Sid.* 27. *Clerk* and *Day*, 1 *Roll. Abr.* 839. *Owen* 148. *Lodington* and *Kime*, 3 *Lev.* 431. 9 *Co.* 173. 2 *Vent.* 55, 211. *Burchett* and *Durdant*, *Raym.* 28, 296. *Liſle* and *Gray*; which Caſe *per Holt* 2 *Jones* 114. miſtakes, in ſaying it was reverſed; for it was affirmed in the *Exchequer-Chamber.*

25. If *A.* deviſes to *D.* his Daughter for Life, and after her Deceaſe to her firſt Son and the Heirs of his Body; and if he die without Heirs of his Body, then to her ſecond and other Sons, *&c.* and the Heirs of their Bodies; and after them, to *N. in eadem forma*; and for Default of ſuch Iſſue to *J. S.* in Fee; and after the Will was finiſhed, but before Publication, the Teſtator adds this Clauſe, *Memorandum*, the Intent and Meaning of the Teſtator is, that *D.* ſhall not alien the Lands given to her, but that they ſhall be to her Heirs Males; and for Want of ſuch Iſſue, to *N.* this reſtrictive Clauſe explains the Intent of the Teſtator; and therefore *B.* ſhall have an Eſtate for Life only, and not an Eſtate-tail by Implication. 1 *Jac.* 2. between *Friend* and *Bouchier*, *Skin.* 240.

26. If *A.* deviſes Lands to Truſtees to pay Debts and Legacies, and then to ſettle the Remainder of one Moiety of what ſhould remain unſold to *H.* and the Heirs of his Body by a ſecond Wife, and in Default of ſuch Iſſue, to her Son *F.* and the Heirs of his Body, the other Moiety to *F.* and the Heirs of his Body, with Remainders over, *Taking ſpecial Care in ſuch Settlement, that it never be in the Power of either of my ſaid Sons* F. *or* H. *to dock the Intail of either of the ſaid Moieties given them, as aforeſaid, during their, or either of their Life or Lives; this* Eſtate being only executory, it muſt be conſtrued, as if like Proviſion had been contained in Marriage-Articles; and therefore the Sons ſhall only have Eſtates for Life conveyed them; but it muſt be without Impeachment of Waſte. Decreed *Mich.* 1705. between *Lennard* and the Earl of *Suſſex*, 2 *Vern.* 526.

v. Roe v. Grew 2 Wils. 322 & MS. by which authority of this decision is much leſſened.

27. A Man ſeiſed in Fee deviſed to *J. B.* for his Life only, without Impeachment of Waſte, and from and after his Deceaſe, then to the Iſſue Male of his Body lawfully to be begotten, if God ſhall bleſs him with any, and to the Heirs Males of the Bodies of ſuch Iſſue lawfully begotten; and for Default of ſuch Iſſue, Remainder to *J. B.* and the Heirs Males of his Body; and for Want of ſuch Iſſue he limits two Remainders over in the ſame Words; and it was adjudged, that *J. B.* took only an Eſtate for Life, for the Eſtate was given to him for Life, and there was a Limitation afterwards to his Iſſue, which was a Deſcription of the Perſon who was to take the Eſtate-tail. 11 *Ann.* between *Backhouſe* and *Wells.*

28. *A.* deviſes Lands to his Wife for Life, and for her better Support he gives and bequeaths unto her the Sum of 500*l.* to be raiſed by her Executors or Adminiſtrators, by Sale of Timber, or by Sale of any Part of the Premiſſes, or otherwiſe by digging, ſinking, getting, and Sale of Coal on the Premiſſes, or any Part thereof, at hers, her Executors, and Adminiſtrators Choice and Election; and if my ſaid Wife ſhall happen to die before the ſaid Sum be raiſed, as aforeſaid, then ſuch Perſon whom ſhe had appointed in her Life-time, to raiſe, for which I give them and her full Power and Authority; provided, nevertheleſs, that if either my Siſters hereafter named, or

ſuch Perſon for whom my Truſtees hereafter named ſhall be Truſtees, ſhall pay unto my Wife, her Executors, *&c.* the ſaid Sum of 500*l.* that the ſaid Power of ſelling ſhall ceaſe; and after the Deceaſe of my ſaid Wife, I deviſe all my Eſtate before-mentioned to *A. B.* and *C.* and the Survivor and Survivors of them, upon the Truſts hereafter-mentioned, that is to ſay, in Truſt for my Siſters *A. L.* and *D. E.* equally betwixt them, during their natural Lives, without committing any Manner of Waſte, from and after the Deceaſe of my ſaid Wife; provided always, that what Sum or Sums of Money, in part or in full of the ſaid 500*l.* hereby left my Wife, ſhall be really paid my Wife, her Executors, *&c.* by either of my ſaid Siſters; that in that Caſe my Will is, that ſuch Money be likewiſe raiſed by getting of Coal on the Premiſſes only; and if either of my ſaid Siſters happen to die, leaving Iſſue or Iſſues of her or their Bodies lawfully begotten, or to be begotten, then in Truſt for ſuch Iſſue or Iſſues of the Mother's Share, or elſe in Truſt for the Survivor or Survivors of them, and their reſpective Iſſue or Iſſues; and if it ſhall happen that both my ſaid Siſters die without Iſſue, as aforeſaid, and their Iſſue or Iſſues to die without Iſſue or Iſſues lawfully to be begotten, the ſaid Truſtees to ſtand and be intruſted to and for my Kinſman *J. S.* and the Heirs Males of his Body, *&c.* and for Want of ſuch Iſſue, then in Truſt for *R. G. &c.* And the chief Queſtion was, whether this was an Eſtate-tail, or an Eſtate for Life in the Siſters, who ſurvived the Wife; and it was adjudged an Eſtate-tail in the Siſters, in the Great Seſſions for the County of *Flint*; which Judgment was reverſed on a Writ of Error in the *King's Bench*; but on a Writ of Error in the Houſe of Lords, the laſt Judgment was reverſed, and the firſt eſtabliſhed, by the Opinion of *Eyres* Ch. Juſt. Ch. Bar. *Pengelly*, and *Forteſcue* Juſt. againſt the Opinion of all the Reſt of the Judges, who held it only an Eſtate for Life in the Siſters. Between *Shaw* and *Weigh*, 28 *April*, 1729.

29. *A.* deviſed certain Lands to his eldeſt Son for Life, without Impeachment of Waſte, Remainder to *J. S.* his Grandchild for Life, without Impeachment of Waſte, with a Power to him to limit a Jointure of the ſame Land to any Woman he ſhould marry, for her Life; and after his Death he deviſed the Lands to the firſt Son of *J. S.* the Grandchild in Tail, and ſo to the ſixth Son, and then deviſed that if *J. S.* the Grandchild ſhould die without Iſſue Male, the Land ſhould remain to *J. B.* and the Queſtion was, what Eſtate *J. S.* took by the Will; and it was certified by the Court of *C. P.* that he took an Eſtate-tail; which was decreed accordingly. *Paſch.* 1707. between *Langley* and *Baldwin*. Note *per Raym.* Ch. Juſt. in the Caſe of *Shaw* and *Weigh*, an Eſtate-tail was raiſed here by Implication, becauſe the expreſs Deviſe was not to all the Sons; for if there had been more than Six, and the Six dead, muſt the Heir at Law have it before a ſeventh Son?

30. The Plaintiff's Father, by his Will, deviſed the Eſtate in Queſtion to the Plaintiff for Life, without Impeachment of Waſte, Remainder to Truſtees, during his Life, to ſupport contingent Remainders, with Remainder to the Heirs of the Body of his ſaid Son, Reverſion to himſelf in Fee, with a Power to the Son to make a Jointure of ſuch a Part, and deviſed likewiſe a conſiderable Perſonal Eſtate to be laid out in a Purchaſe of Lands, and ſettled to the ſame Uſes; and the only Queſtion was whether the Plaintiff took an Eſtate-

tail, or only an Eſtate for Life, by this Will; and the Maſter of the *Rolls*, having taken Time to conſider of it, decreed that he took only an Eſtate for Life, as the Words were expreſs, and had all the other Marks attendant on an Eſtate for Life, and conſequently, that the Heirs of his Body ſhould take by Purchaſe; and though the Eſtate would veſt in the firſt Son, as Tenant in Tail, by Way of Purchaſe, yet not ſo as to exclude the other Sons, or their Iſſue, from taking the like Eſtate, whenever his Eſtate determined for Want of Iſſue; and this he ſaid was ſo reſolved in the Caſe of *Trevor* and *Trevor*, by Lord *Macclesfield*, aſſiſted with the Judges; and as for the Perſonal Eſtate, there could be leſs Difficulty as to that than in the Conveyance of the legal Eſtate in Poſſeſſion; and for that he cited 2 *Vern.* 526. *Mich.* 1728. between *Papillon* and *Bois*.

## (E) Of executory Deviſes of Lands of Inheritance; and here of contingent Remainders, and croſs Remainders, as far as they relate to this Place.

1. A FEE cannot be limited on a Fee; as if Lands are limited to one and his Heirs, and if he dies without Heirs, that it ſhall remain over to another; this laſt Limitation is void; ſo if Lands are given by Deed to one and his Heirs, ſo long as *J. S.* hath Iſſue, and after the Death of *J. S.* without Iſſue, to remain over to another; this Remainder is likewiſe void, becauſe the firſt Deviſee had a Fee, tho' it was a baſe and determinable Fee. *Dyer* 41. *a. Brook* 234. 1 *Co.* 85. *b. Bulſt.* 195. *Plow.* 29. 2 *Leon.* 69. *Co. Lit.* 18. *a. Poph.* 34. 2 *Rol. Rep.* 220. *Godolph.* 355.

2. But yet in a Will ſuch Limitations may be good upon a Contingency that may happen within the Compaſs of a Life, or Lives, *in eſſe*, or a reaſonable Number of Years; but this not by Way of direct Remainder, but by Way of (*a*) executory Deviſe. *Cro. Eliz.* 205. 1 *Rol. Abr.* 626. *Dyer* 124.

(*a*) An executory Deviſe is defined a Future Intereſt which cannot veſt at the Death of the Teſtator, but depends upon ſome Contingency, which muſt happen before it can veſt; of which there are three Kinds, 1*ſt*, Where the Deviſor departs with his whole Fee-ſimple, but upon ſome Contingency qualifies that Diſpoſition, and limits a Fee on that Contingency; and this is new in Law, as appears by the following Caſes. 2*d* Sort is, when the Deviſor gives a future Eſtate to ariſe upon a Contingency, but does not part with the Fee at preſent, but ſuffers it to deſcend to his Heir as a Deviſe, till his Debts are paid, *&c.* to the Heirs of *J. S.* when he ſhall have one; and theſe have been frequent: But *note*, that if an Eſtate be limited upon a Contingency, after a particular Eſtate, capable of ſupporting a Remainder, it ſhall then be conſtrued a contingent Remainder, and not an executory Deviſe. Of the 3*d* Sort are Leaſehold Intereſts or Terms for Years, for which *vide infra* Letter F, and *vide* 1 *Salk.* 226. 2 *Saund.* 380. 1 *Salk.* 229.

3. One deviſed Land in *London* to the *Prior* and *Convent* of *B. ita quod reddant annuatim Decano & Capitulo Sancti Pauli* 14 *Marks*; and if they fail of Payment, that their Eſtate ſhall ceaſe, and that the ſaid Dean and Chapter, and their Succeſſors, ſhall have it; and it was held by *Baldwin* and *Fitzherbert* (the greateſt Lawyers of their Age, as my Lord *Vaughan* ſays) that this Remainder was void, becauſe the firſt Deviſe carrying a Fee, nothing remained after to be diſpoſed of, and executory Deviſes after a Fee-ſimple were in former Ages unknown. 1 *Brook* 234. *Dyer* 33. *a. Vau.* 271. and *per Nottingham Lord Chancellor*, tho' this Doctrine is now exploded,

ploded, yet the Caſe of *Hinde* and *Lyon*, 19 *Eliz.* 3 *Leon.* 64. is the firſt Caſe wherein the contrary has received a ſolemn Reſolution.

4. One having Iſſue three Sons, *A. B.* and *C.* by his Will in Writing deviſes Lands to *B.* his ſecond Son, and his Heirs for ever, and if *B.* die without Iſſue, living *A.* then *A.* to have thoſe Lands to him and his Heirs for ever; *B.* enters and ſuffers a Common Recovery to the Uſe of himſelf and his Heirs, and then deviſes thoſe Lands to the Plaintiff and his Heirs, and dies without Iſſue, living *A.* And it was adjudged, 1*ſt*, That *B.* had a Fee-ſimple by the Deviſe to to him and his Heirs for ever; and that the other Words would not ſo correct or qualify it as to make it an Eſtate-tail, not being, if he die without Iſſue generally; but upon the Contingency of his dying without Iſſue, living *A.* ſo that if he ſurvived *A.* or died in the Lifetime of *A.* leaving Iſſue, *A.* was to have nothing; and this being a Contingency to happen within the Compaſs of Lives then in Being, tho' the firſt Deviſe was after a Fee, yet the Limitation over upon ſuch Contingency was good, and not within the Danger of a Perpetuity; for the Remainder to *A.* is not a Remainder directly, which cannot be after a Fee, but takes Effect by executory Deviſe; and upon Determination of the firſt Eſtate, by the happening of the Contingency, carries over the Land to the other. 2*dly*, It was adjudged, that this being a meer collateral Poſſibility, was not bound by the Recovery, unleſs he to whom it was limited had been Party by Way of Voucher; for it had not Exiſtence at all when the Recovery was ſuffered, and therefore the Recompence in Value could not extend to it. *Mich.* 18 *Jac.* 1. in *B. R.* between *Pells* and *Browne*, *Cro. Jac.* 590. 1 *Rol. Abr.* 611. *S.C. Palm.* 131. 2 *Rol. Rep.* 216. 2 *Leon.* 111. *Vaugh.* 272.

5. One by Will deviſes Lands to his Mother for Life, and after her Death to his Brother in Fee; provided, that if his Wife (being then *enſeint*) be delivered of a Son, that then the Land ſhould remain to him in Fee, and dies, and the Son is born; and it was held, that the Fee of the Brother ſhould ceaſe, and veſt in the Son, by Way of executory Deviſe upon the Happening of the Contingency. *Dyer* 127. *in Margine.*

6. One having Iſſue *A.* his only Daughter and Heir apparent, by Will deviſes Lands in *D.* to her and her Husband, and her Heir, upon Condition, that they ſhould aſſure Lands in *F.* to his Executors and their Heirs, to perform his Will; and if they failed, then he deviſed the ſaid Lands in *D.* to his Executors and their Heirs, and died; and it was adjudged to be no Condition; for then by the Deſcent to the Daughter, being Heir, it would be deſtroyed; but it was held a Limitation, or an executory Deviſe to his Executors, in Caſe the Aſſurance was not made; and that they might for Breach thereof enter and ſell; for tho' a Fee cannot be limited upon a Fee abſolute, yet upon a Fee determinable it may, and enures as a new original Deviſe to take effect, when the firſt Deviſee failed to make the Aſſurance. *Dyer* 33. *a. in Margine*, *Palm.* 135. *Cro. Jac.* 592. *Cro. Eliz.* 359. *S.C.*

7. If *A.* deviſes Lands to *B.* for five Years, from *Michaelmas* following, the Remainder to *C.* and his Heirs, and *A.* dies before *Michaelmas*; yet this is a good Remainder, tho' it cannot veſt before the particular Eſtate begins; and the Freehold cannot be in Expectancy, for in the mean Time the Fee ſhall deſcend to the Heir. *Cro. Eliz.* 878.

8. One

8. One deviſes Lands to his Wife, till his Son came to the Age of twenty-one Years, and then that his ſaid Son ſhould have the Lands to him and his Heirs; and if he dies without Iſſue, before his ſaid Age, then to his Daughter and her Heirs; this is a good contingent or executory Deviſe to the Daughter; if the Contingency happens, and in the mean Time the Fee deſcends to the Son as Heir; and if he lives to twenty-one, tho' he after die without Iſſue, or leaves Iſſue, tho' he die before twenty-one, yet the Daughter is not to have the Lands, becauſe he is to die without Iſſue, and before twenty-one, or elſe the Daughter cannot take. 2 *Rol. Rep.* 197, 217. *Palm.* 132.

9. But where one having Iſſue three Sons, *A. B.* and *C.* deviſes to his Son *A.* after the Death of his Wife, to him and the Heirs of his Body lawfully begotten, in Fee-ſimple; and if he die in the Life of my Wife, that then my Son *C.* ſhall be his Heir, and dies; *A.* hath Iſſue, and dies in the Life of the Wife; and it was adjudged that the Iſſue ſhould have the Land after the Death of the Wife, and not *C.* for it was in Effect a Deviſe to the Wife for Life, Remainder to *A.* in Tail, Remainder to *C.* in Fee, upon the Contingency of *A.*'s Dying in the Life of the Wife, and does not abridge the Eſtate-tail expreſly given *A.* by his Dying in the Life of the Wife. Between *Spalding* and *Spalding*, *Cro. Car.* 185.

10. Baron and Feme being ſeiſed of a Copyhold, to them and the Heirs of the Baron, he ſurrenders it to the Uſe of his Will, and then deviſes it to the Heirs of the Body of the Feme, if they attain the Age of Fourteen, and dies without Iſſue; and then ſhe marries a ſecond Husband, and has Iſſue that attains the Age of Fourteen, and then ſhe dies; and whether this was a good Deviſe by Reaſon of the double Contingency, *ſcilicet*, the having Heirs of her Body, and that ſuch Heir ſhould live till 14, was doubted; but it was admitted, that if the Deviſe was good, it muſt be by Way of executory Deviſe, which is allowable when to take Effect within the Compaſs of a Life, but not after a Dying without Iſſue, for that tends to a Perpetuity; and it cannot take Effect by Way of Remainder; for it is a new Deviſe to take Effect after her Death, and is not as a Remainder joined to her Eſtate. But the Court being divided upon the Point of the Contingency, it was agreed to be adjourn'd into the Exchequer Chamber; and the Reporter ſuppoſes the Parties agreed afterwards, for he heard no more of it. Between *Snow* and *Cutler*, 1 *Lev.* 135.

11. If a Man having only one Siſter and Heir, who had Iſſue *A.* and after married *B.* by whom ſhe had Iſſue *C.* and *D.* deviſes Lands to his Siſter until *C.* attains twenty-one, and after *C.* attains that Age, to *C.* and his Heirs; and if *C.* dies before twenty-one, then to the Heirs of the Body of *B.* and their Heirs, as they ſhall attain their reſpective Ages of twenty-one, and dies; *C.* dies before twenty-one, living *B.* and after *B.* dies, *D.* either as Heir of *C.* in whom the Fee was veſted, or as Heir of the Body of *B.* (though he could not be ſo during the Life of *B.*) being of Age after the Death of *B.* ſhall have the Eſtate by Way of executory Deviſe, and not the right Heir of the Deviſor. Between *Taylor* and *Biddulph*, 2 *Mod.* 289. adjudged.

12. If *A.* hath Iſſue two Sons, *viz. B.* and *C.* and deviſes Lands to *B.* for Life, and if he dies without Iſſue living at his Death, that then the Fee ſhall remain to the Heirs of *B.* for ever, by which Deviſe *B.* has only an Eſtate for Life, the Remainder to his Heir not

executed; and tho' the Reverſion deſcended on *B.* as Heir of *A.* yet it drowned not the Eſtate for Life againſt the expreſs Deviſe and Intention of the Will, but left an Opening, as it was termed, for the Interpoſition of the Remainder, when it ſhall happen to interpoſe between the Eſtate for Life and the Fee; and that this being a contingent Remainder, and not an executory Deviſe, was barred by the Recovery ſuffered by *B.* Between *Holmes* and *Plunket*, 1 *Lev.* 11.

13. If one deviſes Lands to his Wife for Life, and if ſhe hath a Son, and cauſes him to be called by the Chriſtian and Surname of *Sampſon Shelton*, then after her Death deviſes the ſame to her Son; and if he die before twenty-one, to the right Heirs of the Deviſor, and dies; and after the Wife marries *Broughton*, by whom ſhe has a Son, which ſhe cauſed to be chriſtened *Sampſon Shelton*, *&c.* the Deviſe is good by Way of contingent Remainder, but not by Way of executory Deviſe; for when a contingent Eſtate is limited, and depends upon a Freehold, which is capable of ſupporting a Remainder, it ſhall never be conſtrued an executory Deviſe, but a contingent Remainder; adjudged, and that the Reverſion deſcending to the Heir of the Deviſor till the Contingency happened by the Bargain and Sale, and Fine thereof, by the Heir of the Deviſor to *B.* and his Wife, and their Heirs, before the Birth of their Son, the contingent Remainder was deſtroyed. Between *Purefoy* and *Rogers*, 2 *Saund.* 380.

14. *A.* having two Sons *B.* and *C.* deviſed Lands to *B.* for fifty Years, if he ſhould ſo long live; and as for my Inheritance after the ſaid Term, I deviſe the ſame to the Heirs Males of the Body of *B.* and for Default of ſuch Iſſue, then to *C.* And the Court reſolved, 1*ſt*, That *B.* had not an Eſtate-tail by Implication, upon the Words *without Iſſue*, becauſe the Deviſor had given him an Eſtate for Years by expreſs Words; and the Court cannot make ſuch a Conſtruction againſt expreſs Words, when thereby they would drown the Eſtate for Years, and make an Eſtate of Inheritance. 2*dly*, The Court held this Deviſe to the Heirs Males of the Body of *B.* to be void in its Creation, for Want of an Eſtate of Freehold to ſupport it; and they ſeemed not to think it an executory Deviſe, becauſe it was limited as a Remainder, and becauſe it was limited *per verba in præſenti*; for if one deviſe his Eſtate to the Heir of *J. S.* and *J. S.* is living, the Deviſe ſhall not be conſtrued an executory Deviſe, and ſuch a Deviſe is therefore void; but if it were to the Heir of *J. S.* after the Death of *J. S.* that is good as an executory Deviſe. 3*dly*, The Court held the Limitation to the Heirs of *B.* was become void by the Event, whatever it was, in its Creation; becauſe *B.* is now dead without Iſſue. 4*thly*, The Court held, that if the Remainder to the Heirs Males of *B.* was void in Point of Limitation, then the next Remainder limited to *C.* took Effect preſently. Between *Goodright* and *Corniſh*, 1 *Salk.* 226. 4 *Mod.* 255. *S. C.*

15. *A.* ſeiſed in Fee, deviſed to Truſtees for eleven Years, and then to the firſt Son of *A.* and the Heirs Males of his Body, and ſo on to the ſecond, third, *&c.* Sons in Tail Male; provided they the ſaid Sons ſhall take on them my Surname; and in Caſe they, or their Heirs, refuſe to take my Surname, or die without Iſſue, then I deviſe my Land to the firſt Son of *B.* in Tail Mail, provided he take my Surname; and if he refuſe, or die without Iſſue, then to the right Heirs of the Deviſor. *A.* had no Son at the Time of the Deviſe, and died without Iſſue; and *B.* had a Son who was living at

the Time of the Deviſe, who took the Surname of the Deviſor. The whole Court agreed, that the Deviſe to *B.* was not a contingent Remainder, becauſe of the precedent Eſtate for Years, which could not ſupport it; it appears likewiſe by the Caſe, to be the Opinion of *Treby* Ch. Juſt. and Juſt. *Powell*, that it could not be good as an executory Deviſe, if it were conſidered as a Deviſe to the Heirs of *A.* being limited *per verba in præſenti*; but *Blencow* Juſt. held, that the Deviſe to the Son of *A.* was future; for he ſuppoſed the Teſtator knew that *A.* had no Son, and the rather becauſe he does not name him; but it was adjudged and affirmed in *B. R.* that the Remainder to *C.* was good, and veſted in him. *Scatterwood* and *Edge*, 1 *Salk.* 229.

16. A Man deviſed Lands to his Executors till his Son ſhould come of Age, and when his Son ſhould come of Age, then he ſhould enjoy it, for him and his Heirs; this is a Remainder executed in the Son, and not in Contingency; for the Words *when* and *then*, in this Caſe, only denote the Time when the Remainder is to execute, and will no more make the Remainder contingent, than in the common Caſe, when a Leaſe is made for Life or Years; and after the Deceaſe of the Tenant for Life, or the Expiration of the Term of Years, then to remain to another; for tho' the Words be, *after the Term it ſhall remain*, yet it is a preſent and not a contingent Remainder; for where Words refer to that which muſt needs happen, there ſhall be no Contingency. *Boraſton's* Caſe, 3 *Co.* 19.

17. *A.* having Iſſue five Sons (his Wife being *enſeint* with a Sixth) deviſed two Thirds of his Land to his four younger Sons and the Child *in Ventre ſa mere*, if it were a Son, and their Heirs; and if they all die without Iſſue Male of their Bodies, or any of them, that the Lands ſhall revert to the right Heirs of the Deviſor; by this Deviſe the younger Sons are Tenants in Tail in Poſſeſſion, with croſs Remainders over to each other; and no Part ſhall revert to the Heirs of the Deviſor till all the younger Sons be dead without Iſſue Male of their Bodies. *Dyer* 303. *Hob.* 33.

18. A Man having two Sons deviſed Part of the Lands to one of them and his Heirs, and the Reſt to the other and his Heirs; and further Wills, that the Survivor ſhall be Heir to the other, if either dies without Iſſue; by this the Deviſees are Tenants in Tail, with Remainder in Fee executed of each other's Part. *Cro. Jac.* 695.

19. But where a Man having three Sons, and ſeiſed of three Houſes, deviſed a Houſe to each Son and his Heirs, with this Proviſo, that if all his ſaid Childen ſhall die without Iſſue of their Bodies lawfully begotten, that then all his ſaid Meſſuages ſhall remain over, and be to his Wife and her Heirs; and it was held in this Caſe, that theſe Words did not raiſe any croſs Remainders, but that at the Death of any of the Sons his Houſe ſhall go immediately to the Wife; and though a croſs Remainder may be by Implication, where Lands are limited to Two, yet they cannot riſe where Three or more Houſes are limited to Three, without expreſs Limitation, becauſe of the Inconvenience. Between *Gilbert* and *Witty*, *Cro. Jac.* 655. *Vide* 1 *Vent.* 224. where *per Hale* Ch. Juſt. no croſs Remainders can be created by Implication in a Deed, nor any in a Will between Three, or more, unleſs the Words of the Will do plainly expreſs the Intent of the Deviſor to be ſo; as where *Black-acre* is deviſed to *A. White-acre* to *B.* and *Green-acre* to *C.* and if they die without Iſſues of their

Bodies, *vel alterius eorum*, then to remain; there, by Reaſon of the Words *alterius eorum*, croſs Remainder ſhall be.

## (F) Of executory Deviſes of Leaſes for Years, and here of the Limitation of the Truſt of a Term, as far as it relates to and agrees with the Deviſe thereof.

1. IF a Termor deviſes his Term to *A.* for Life, the Remainder to another, tho' *A.* has the whole Eſtate (for that is in him during his Life) and ſo no Remainder can be limited over at Common Law; yet it is good by Way of (*a*) executory Deviſe. *Cro. Jac.* 198. 1 *Rol. Abr.* 610. 8 *Co.* 94.

(*a*) The great Queſtion in theſe Caſes was, whether the Diſpoſition of the Term to a Man for his Life, was not ſuch a total Diſpoſition of it, that no Remainder could be limited over, it being in the Eye of the Law a greater Eſtate than for any Number of Years; which was reſolved in the Affirmative, in the Reign of 6 *E.* 6. *Dyer* 74. by all the Judges of *England*; but this Reſolution ſeeming very ſevere, and againſt natural Juſtice, that a Man ſhould be hindered from making Proviſion for his Family and the Contingencies of it, occaſioned a contrary Reſolution, 19 *Eliz. Co. Lit.* 46. *Dyer* 35. for the Judges obſerving the good Effect ſuch Limitations by Way of Truſt had, which were allowed in Chancery, permitted Farmers to diſpoſe of their Leaſes in the ſame Manner by Laſt Will; and then the Chancery, the better to fix them in it, allowed of Bills by the Remainder-man to compel the Deviſee of the particular Eſtate to put in Security, that he in the Remainder ſhould enjoy it, according to the Limitation; but when they perceived that this multiplied Chancery Suits, they reſolved that there was no need of that Way, 10 *Co.* 47. *a.* 52. *b.* 1 *Sid.* 451. but that the particular Deviſee ſhould not have Power to bar the Remainder-man; ſo that the Law has been long ſettled, that executory Deviſes are good, provided the Contingency is to happen within a Life or Lives all *in eſſe*; for there can be no Tendency to a Perpetuity, which was one great Miſchief apprehended from theſe Kind of Limitations; but what Kind of executory Deviſes do, or do not tend to a Perpetuity, will be beſt ſeen by the Caſes themſelves.

2. If *A.* poſſeſſed of a Term for Years, deviſes it to *B.* his Wife for eighteen Years, and after to *C.* his eldeſt Son for Life, and after to the eldeſt Iſſue Male of *C.* for Life, tho' *C.* had not any Iſſue Male at the Time of the Deviſe and Death of the Deviſor; yet if he had Iſſue Male before his Death, this Iſſue Male ſhall have it as an executory Deviſe; for altho' there be a Contingent upon a Contingent, and the Iſſue not *in eſſe* at the Time of the Deviſe, yet in as much as it is limited to him but for Life, it is good, and all one with *Manning*'s Caſe, upon a Reference out of Chancery to Juſtice *Jones*, *Croke* and *Barkley*, between *Cotton* and *Heath*, by them reſolved, without Queſtion. 1 *Roll. Abr.* 612.

3. If *A.* poſſeſſed of a Term deviſes it to *B.* his Wife for Life, and after her Death to his Children unpreferred; and after *B.* dies, *C.* then being the only Daughter of *A.* ſhall have it; for an executory Deviſe, that hath a Dependance on the firſt Deviſe, may be made to a Perſon uncertain. 1 *And.* 60, 61.

4. If one poſſeſſed of a Term deviſes it to his Wife for Life, the Remainder to his firſt Son for Life; and if he dies without Iſſue, to his ſecond Son, *&c.* The Remainder to the ſecond Son is void; for the Remainder of a Term cannot depend upon a Poſſibility ſo remote as the dying without Iſſue; although it was objected, that the Deviſe was not to the firſt Son and his Iſſue, (in which Caſe it was agreed it ſhould go to his Executor) but it was given to him for Life only, with an executory Deviſe to the ſecond Son, upon the Contingency of the firſt not having Iſſue at the Time of his Death. Between *Love* and *Windham*, 1 *Lev.* 290. 2 *Chanc. Rep.* 14. *S. C.*

5. If

5. If a Man poſſeſſed of a Term for Years, deviſes it to *D.* his Wife for Life, and after to *W.* his eldeſt Son, and his Aſſigns; and if he dies without Iſſue then living, to *T.* this being a perpetual Limitation by Intendment of Law is void; and if Men ſhould be admitted to make ſuch Deviſes, there would not be any End of them, nor any Certainty. Between *Child* and *Bayly*, *Cro. Jac.* 459, 460. 1 *Rol. Abr.* 613. *Note*; The Authority of this Caſe is ſhaken by the Duke of *Norfolk*'s, and denied to be Law. 1 *Salk.* 225.

6. If a Man poſſeſſed of a Term deviſes it to his Son, and if he dies unmarried, and without Iſſue, to his Daughters; and if his Son be married, and has no Iſſue then living to enjoy it, then after the Death of his Son's Wife, he deviſes it to his ſaid Daughters; the Deviſe to the Daughters is void, being a Limitation after the Death of their Brother without Iſſue; for it is not to be taken (as objected) that the Dying ſhould be without Iſſue living at his Death, and ſo the Contingency to happen within the Compaſs of a Life; and if it ſhould be intended of ſuch a Dying without Iſſue, yet the Court held it would be void, according to *Child* and *Bayly*'s Caſe; for tho' ſuch a Deviſe hath prevailed in Caſe of an Inheritance, as in *Pell* and *Brown*'s Caſe, yet it hath not yet prevailed in Caſe of a Term; and the Court ſaid they would not extend the Deviſes of Chattels to make Perpetuities, farther than they had been. Between *Gibbons* and *Summers*, 3 *Lev.* 22, 23. *Q.*

7. *A.* having Iſſue ſeveral Sons (the Eldeſt *Non Compos*) created a Term for Years, and by another Deed declared the Truſt thereof to his ſecond Son and the Heirs Males of his Body, Remainder to his other Sons; provided, that if his eldeſt Son died without Iſſue, or not leaving his Wife *enſeint* with a Child, living the ſecond Son, ſo that the Earldom of —— deſcended on the ſecond Son, then the ſaid Term to remain to the third Son and the Heirs Males of his Body, with like Limitations to the other Sons; the eldeſt Son died without Iſſue, living the Second; and this Limitation to the third Son was held good; and ſo decreed by my Lord *Nottingham*, contrary to the Opinion of the three Chief Juſtices who aſſiſted him. 3 *Chan. Ca.* 1 The Duke of *Norfolk's* Caſe. *Note*; This Decree was reverſed by *North* Lord Keeper, 1 *Vern.* 163. but upon an Appeal to the Houſe of Lords, the laſt Decree was reverſed, and Lord *Nottingham*'s eſtabliſhed, 1 *Chan. Ca.* 53. *Note*; executory Deviſes and Limitations of the Truſt of a Term are governed alike. 1 *Vern.* 234.

8. If a Term is deviſed to *A.* and the Heirs of his Body, and if *A.* die without Iſſue, living *B.* then to *B.* this is a good Limitation, the Contingency ariſing within the Compaſs of a Life. Adjudged between *Lamb* and *Archer*, 5 *W. & M.* in *B. R.* 1 *Salk.* 225. and *Child* and *Bayly*'s Caſe denied to be Law.

9. *J. S.* deviſes to his Son a Leaſehold Eſtate, to his Executors, Adminiſtrators and Aſſigns for ever; but if he died before twenty-one, without Iſſue, in that Caſe deviſes it over to his Brother; and the Queſtion was, whether the Remainder over was good. It was objected, that it was a Perpetuity, for that the Remainder depends on the Son's Dying without Iſſue; for if he die before twenty-one, tho' he leaves a Child, and that Child afterwards dies without Iſſue, the Son may be ſaid to be dead before twenty-one, without Iſſue: *Sed non allocatur*; and the Court decreed the Remainder over good. *Trin.* 1690 between *Martin* and *Long*, 2 *Vern.* 151. And a like

Caſe ſaid to have been adjudged in the Exchequer, between *Smith* and *Smith*.

10. One *F.* being poſſeſſed of a Term for Years, deviſes it to his Wife for Life, and after her Death to *R. F.* for her Life; and after her Death to *T. F.* and his Children; and then deviſes in this Manner; and if it ſhall happen the ſaid *T. F.* do die before the Expiration of the ſaid Term, not having Iſſue of his Body then living, then to go over to the Plaintiffs for the Reſidue of the Term; the Defendant's Title was by an Aſſignment of *R. F.* and *T. F.* of all their Eſtate, Right, Title and Intereſt. *R. F.* was dead, and *T. F.* died without Iſſue, and the Plaintiff brought his Bill to have an Aſſignment of the Term purſuant to the Will; all that was inſiſted upon for the Defendant, to difference this Caſe from the Duke of *Norfolk*'s of a Term, and of *Pell* and *Browne*'s Caſe, of a Fee, was, that this Contingency of his dying without Iſſue, was not confined to his own Death, but that the Words, *then living*, ſhould relate to the Words, *before the Expiration of the Term*; and ſo this went further than any of the Caſes had ever yet been carried, for he might have Iſſue for ſeveral Generations; and yet if ſuch Iſſue failed at any Time before the Expiration of the Term, then it was to go over; and this in a long Term tended plainly to a Perpetuity, and therefore ought not to be allowed; but by the Deviſe to *T. F.* and his Children, and the ſubſequent Words, and if he die without Iſſue, the whole Term and Intereſt was veſted in him, and he might diſpoſe thereof as he thought fit, and it could not be reſtrained by the Words *then living*, which related only to the Words, *before the Expiration of the Term*, and ſo the Remainder over to the Plaintiff void; but for the Plaintiffs it was argued and decreed, that the Remainders to them was good, by Way of executory Deviſe, and that the Words, *then living*, muſt relate to the Time of his Death; for otherwiſe there would be no Difference between this and the common Limitations of a Term to one and the Heirs or Iſſue of his Body; and if he dies without Iſſue, the Remainder to another, which is void; for there it muſt likewiſe be intended, if he die without Iſſue before the Expiration of the Term, or during the Term; ſince after the Expiration of the Term he can limit no Remainders over, becauſe nothing remains then to be limited; but here it being limited over upon this Contingency, if he die without Iſſue then living, *viz.* at the Time of his Death, it is good, becauſe the Contingency muſt happen within one Life, or not at all; for upon his Death it will be certainly known, whether he leaves Iſſue, or not; if he does, the Contingency cannot take Place; if he does not, then it may; and this being to happen within the Compaſs of a Life, is good as an executory Deviſe, and differs in nothing from the Duke of *Norfolk*'s Caſe, ſave only that there it was by *Proviſo*, and alſo upon the Death of another Perſon without Iſſue then living; and here it is upon his own Death, which makes no Manner of Difference. *Fletcher*'s Caſe, decreed *Trin.* 1709.

11. A Man poſſeſſed of a Term for thirty-one Years deviſes it to his Son *H.* during his Minority; and if he attains to his Age of twenty-one Years, then to him during his Life, if the Term ſhall ſo long continue, and no longer, and after his Death to ſuch of his Iſſue to whom he ſhall deviſe it; but if he die without Iſſue, then to his other Son *G.* for the Reſidue of the Term. *H.* afterwards died

without Iſſue, or without making any Diſpoſition of the Reſidue of the Term; and the only Queſtion was, whether by the Words of this Will, the whole Term did not veſt in *H.* and it was decreed, that it did not; for the Words, *die without Iſſue*, have a twofold Meaning, either without Iſſue at the Time of his Death, or without Iſſue whenever the Iſſue fails; and though in Caſe of an Inheritance, if Lands are deviſed to one, and if he die without Iſſue, the firſt Deviſee takes an Eſtate-tail by Implication, which ſhall go to his Iſſue, and they ſhall take in a Courſe of Deſcent to all ſucceeding Generations; but to make ſuch a Conſtruction in the Caſe of a Term, which cannot come to the Iſſue by Deſcent, is unneceſſary, and therefore in ſuch Caſe, the other Conſtruction of the Words, which is moſt natural and obvious ſhall take Place; and it ſhall be intended only, if he die without Iſſue living at the Time of his Death, and conſequently the dying without Iſſue being confined within the Compaſs of a Life, hinders not the Remainder over; but it may well take Place by Way of executory Deviſe, according to the former Reſolutions. Decreed *Paſch.* 1718. between *Targett* and *Gant.*

## (G) Of Terms for Years, and incertain Intereſts by Deviſe.

1. A Man deviſed his Land to his Executors for Payment of his Debts, and after Debts paid, the Remainder over; and it was admitted clearly, that the Remainder was good; but the Queſtion was, what Eſtate the Executors had, for there being no particular Eſtate limited, if an Eſtate ſhould be adjudged for them for Life, it might determine before they received ſufficient to anſwer the End of the Deviſe; for on their Death it would not go to their Executors; and it was adjudged an incertain Intereſt, which ſhould go from Executor to Executor for Payment of Debts. *Cro. Eliz.* 315. 8 *Co.* 96. 1 *Roll. Abr.* 829.

2. *A.* deviſes his Lands to his Executors, till his Son comes of Age, the Profits to be imployed in the Performance of his Will, tho' the Son dies before he be of Age, yet the Intereſt of the Executors continues till he might be of Age, if he had lived; for ſince the Intent of the Deviſor governs in Wills, it might deſtroy that, if the Executors Intereſt ceaſed at the Death of the Son; for it is reaſonable to believe, that the Teſtator found, on a Computation, that the Profits of the Land, in that Time, would anſwer his Debts, *&c.* ſo that this is a good Deviſe of the Term, till the Son would be twenty-one, tho' he die before. 1 *Chan. Ca.* 113. 3 *Co.* 20. *b. Boraſton's* Caſe; *S. P.*

3. If a Man deviſes Land to his Wife, till his Son comes of Age, to provide his Children with Neceſſaries; though the Wife dies before the Son comes of Age, yet her Intereſt does not determine by her Death, becauſe it was not a Matter of mere Confidence, but ſhall go to her Executors; but if the Deviſe had been, that his Land ſhould deſcend to his Son, but that his Wife ſhould have the full Profits thereof, until the full Age of his Son, for his Education; here is nothing deviſed to the Wife but a meer Confidence, that ſhe ſhall take the Profits for the Education of the Son; and by the Will ſhe is but in Nature of a Guardian or Bailiff, for the Benefit of

the Infant, which determines by her Death. *Cro. Eliz.* 252. *Dyer* 210.

4. A Man deviſed certain Lands to his Wife, till his Son and Heir apparent ſhould attain to his Age of twenty-one Years, and when his Son ſhould attain to his Age, then to his Son and his Heirs, and died; the Son lived to the Age of thirteen Years, and then died; and the Wife ſuppoſing that ſhe had a Title to hold the Lands till ſuch Time as the Son would have attained his Age of twenty-one Years, in Caſe he had lived to that Time, continues in the Perception of the Rents and Profits of the ſaid Lands for ſeveral Years; and the Bill was brought againſt her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and tho' the Wife was Executrix likewiſe of her Husband, yet it not being deviſed during that Time for Payment of Debts, nor any Creditors, or Want of Aſſets appearing, it was held by my Lord *Chancellor*, that the Wife's Eſtate determined by the Death of the Son, and that the Remainder veſted preſently in the Son upon the Teſtator's Death, and was not to expect till the Contingency of his attaining his Age of twenty-one Years ſhould happen; for then in this Caſe it never would have veſted, he dying before that Age, and therefore decreed the Wife to account for the Profits from the Time of the Son's Death; and upon a Rehearing his Lordſhip continued of the ſame Opinion, and grounded himſelf on the Diſtinctions taken in 3 *Co.* 19. and 6 *Co.* 35. *Hill.* 1713. between *Manfield* and *Dugard*.

5. If a Copyholder deviſes his Land to *A.* and *B.* his two Sons, and to the Heirs of their two Bodies begotten, and Wills that each of them ſhall enter at the Age of twenty-one Years, the Executors ſhall not take the Profits till they are both of full Age; but he who comes of Age firſt ſhall enter, and then the other when he comes of Age, and they ſhall hold the Land jointly. *Cro. Jac.* 259. *Yelv.* 183. *vide* 1 *Bulſt.* 48. *cont'*.

6. *A.* deviſed to *B.* during his Exile; and if it pleaſe God to reſtore him to his Country, or if he die, then to *J. S. B.* was a *Dutchman*, and had a Penſion from the States; but upon ſome Diſpleaſure the States deprived him of his Employment and of his Penſion, and gave them to another; whereupon he voluntarily left the Country, and lived here with *A.* who had been his Acquaintance beyond Sea; and after his Coming hither, a War happened between the *Dutch* and *Engliſh*, and afterwards a Peace was concluded between the two Nations; yet *B.* continued here, and whether his Eſtate was determined, was the Queſtion; and the Court held it was not, for that the Exile intended by *A.* was the Leaving his Country, becauſe of the States Diſpleaſure to him, and the Withdrawing of his Penſion upon that Diſpleaſure. Between *Paget* and *Voſcius*, 2 *Lev.* 191.

7. *A.* deviſed his Land to *B.* and *C.* and the Survivor of them, till 800 *l.* ſhould be raiſed out of them; and it was adjudged that *B.* and *C.* ſhould have the Land no longer than they might have received it out of the Profits; and that if a Stranger enters after the Death of the Deviſor, they may have an Account of the mean Profits, but cannot hold the Land longer than the Sum might have been levied; for if that were allowed, they might make it an eternal Charge on the Heir's Eſtate; but if the Heir himſelf enters and diſturbs them, they

6 Vin. Abr. Devise. Lea. B. R. Hil. term 89. Term Rep. 3 Vol. 411 p.

they may hold over, for the Heir ſhall have no Benefit of his own Wrong, or they may have their Action againſt him at their Election. 4 *Co.* 82. *Corbet's* Caſe, *Cro. Eliz.* 800. 1 *Salk.* 153. *S. P.*

## (H) Of Deviſes by Implication.

1. IF *A.* deviſes Lands to his Heir, after the Death of his Wife; this is a good Deviſe to the Wife for Life by (*a*) Implication; for by the expreſs Words of the Will, the Heir is not to have it during her Life; and if the Wife has it not, none elſe can, for the Executors cannot intermeddle. 1 *Rol. Abr.* 843. 1 *Vern.* 22. *S. P.* 2 *Vern.* 572. *S. P.* 2 *Vent.* 223. *S. P.*

(*a*) The Law in conveying of Eſtates did not regularly ſuffer any to paſs by Implication, becauſe it is a Manner of transferring no Way agreeable to the Plainneſs and Solemnity of the Law: As if *A.* ſurrendered to the Uſe of *D.* and *B.* and for Want of Iſſue to *B.* the Remainder over to *C.* This in a Conveyance at Law had been but an Eſtate for Life to *B.* and no Eſtate-tail by Implication; but as there has been greater Favour and Latitude allowed in the Diſpoſition of Eſtates by Will; and in the Conſtruction of them, the Judges, to ſupport the Intent of the Deviſor, where it was very apparent, have admitted Eſtates by Implication, tho' to the Diſheriſon of the Heir at Law: But where ſuch Eſtates ariſe, it muſt be by a neceſſary, and not a poſſible Implication or Intention in the Deviſor; for the Heir's Title being plain and obvious, no Words, by Conſtruction ſhall impeach it, which will bear a contrary Signification. *Vaugh.* 263.

2. If a Man deviſes to a Stranger, after the Death of his Wife, this gives the Wife no Eſtate for Life, by Implication; for it is but a Demonſtration when the Eſtate of the Stranger ſhall commence. *Bro. Dev.* 52. *Cro. Jac.* 75. 1 *Vern.* 22. 2 *Vern.* 572. 2 *Vent.* 223.

3. If one having a Wife and two Daughters Heirs at Law, deviſes Lands to one of the Daughters, after the Wife's Death, this gives the Wife an Eſtate for Life, tho' the Daughter was but one of the Coheirs. 2 *Vern.* 723.

4. If a Man poſſeſſed of a Term for Years deviſes it to his Son, after the Death of his Wife, and the Wife is made Executrix, ſhe ſhall have the whole Term as Executrix, for there cannot be an Eſtate for Life of a Term by Implication, as there may be of an Inheritance. *Moor* 635.

5. *A.* ſeiſed of a Manor, Part in Demeſnes, and Part in Services, deviſed all the Demeſnes to his Wife expreſly for Life, and all the Services for fifteen Years, and then deviſed the whole Manor to a Stranger after her Death; it was reſolved, that the laſt Deviſe ſhould not take Effect till after her Death, and yet ſhe ſhould not have the Services for her Life by Implication, but that the Heir ſhould enjoy the Services, after the fifteen Years, tho' ſhe were ſtill alive; for there appears no neceſſary Implication, that ſhe ſhould have the Whole for her Life, with an Excluſion of the Heir; and a poſſible Implication is not ſufficient to exclude him; for nothing, but the apparent Intent of the Deviſor, can do that; but if the Deviſor had ſaid, that after the Death of his Wife and the Stranger, the Heir ſhould have the Manor, the Wife by a neceſſary Implication ſhall have the whole Manor for her Life; for the Deviſor's Intent is plain, that the Heir is not to have the Manor, while the Stranger and the Wife live, and the Stranger cannot take any Thing whilſt ſhe lives. *Moor, pl.* 24. *Vaugh.* 365.

6. One having Iſſue a Son, who was his Heir apparent, and two Daughters, deviſes in theſe Words; If it happen my Son *B.* and my two Daughters to die, without Iſſue of their Bodies lawfully begotten, then all my Lands ſhall be and remain to my Nephew *D.* and his Heirs for ever, and dies; and it was held, 1*ſt*, That no expreſs Eſtate was by this Will given to his Children. 2*dly*, Nor any Eſtate by Implication, becauſe then it muſt be either a joint Eſtate for Life, with ſeveral Inheritances in Tail, or ſeveral Eſtates-tail in Succeſſion one after another; the laſt it cannot be, becauſe incertain which ſhall take firſt, which next; and the firſt it ſhall not be, becauſe the Heir at Law ſhall not be diſinherited without a neceſſary Implication, which in this Caſe there is not, for it is only a Deſignation and Appointment of the Time when the Land ſhall come to the Nephew; as if he had deviſed thus; I leave my Land to deſcend, or, I give my Land to my Son and his Heirs; till he and my two Daughters die without Iſſue, or ſo long as any Heirs of the Body of him and my two Daughters ſhall be living; and then, or for Want of ſuch Heirs, I deviſe the ſame to my Nephew; this is good as a future and executory Deviſe; and in the mean Time the Land ſhall deſcend to the Heir at Law, he having made no Diſpoſition thereof. Between *Gardiner* and *Shelton*, *Vaugh.* 259.

7. *A.* deviſes to *B.* and his Heirs Males, and if he dies without Heirs of his Body, then to remain to *C.* in Fee; this is but an Eſtate in Tail Male to *B.* for the Law ſupplies the Words, *of his Body*, and ſince the Deviſor only gave it by expreſs Words to him and his Heirs Male, it would be againſt his plain Words, to let in Iſſue Female by Implication on the other Words, *viz.* If he dies without Heir of his Body. *Dyer* 171.

8. So if a Man deviſes to *A.* and the Heirs of his Body; and if he die without Heirs, theſe laſt Words will not give the Deviſee an Eſtate in Fee by Implication. 2 *Vern.* 451. Where an Eſtate for Life may be inlarged by Implication, *vide* Letter (D).

## (I) Of Deviſes of Lands for Payment of Debts.

1. A Man ſeiſed of Copyhold Lands ſurrenders them to the Uſe of his Will, and then by his Will ſays, *My Debts and Legacies being firſt deducted, I deviſe all my Eſtate, both Real and Perſonal, to* J. S. and it was held by my Lord Chancellor, that this ſhould amount to a Deviſe to ſell for the (*a*) Payment of Debts. *Paſch.* 1682. between *Newman* and *Johnſon*, 1 *Vern.* 45.

(*a*) Creditors are ſo far favoured in Equity, that whenever it appears to be the Teſtator's Intent, that his Lands ſhould be liable to his Debts, Equity will make them ſubject, though there are not expreſs Words of Charge; but *note*, that there muſt be ſomething more than a bare Declaration, that his Debts ſhould be paid, otherwiſe it ſhall be intended out of the perſonal Eſtate, and the Real will not be liable, as appears by the Caſes on this Head.

2. *A.* deviſed all his Lands to *B.* and the Heirs of his Body; and in another Part of his Will, reciting, that he owed *B.* Money upon Account, he therefore deviſed to him all his Perſonal Eſtate, and made him Executor, willing him to pay his Debts; and upon the Reading of the Will, though the Clauſe as to the Payment of Debts ſeemed to relate to the Perſonal Eſtate only; and though the Lands were deviſed to *B.* in Tail, with a Remainder over to another;

another; and that it was objected, that a Tenant in Tail could not be a Truſtee; yet the Court decreed both Real and Perſonal Eſtate to be ſold for Payment of the Teſtator's Debts. *Mich.* 1686. between *Clowdſly* and *Pellham*, 1 *Vern.* 411. 2 *Vern.* 229. *S. C.* cited, and the Decree ſaid to be affirmed in the Houſe of Lords.

3. But where a Deviſe was in the following Manner: *I Will all my Debts ſhall be paid before any of my Legacies or Gifts herein after mentioned*, and deviſes ſeveral pecuniary Legacies; and after, in the ſame Will, deviſes Lands to *J. S.* on Condition to pay a certain Rent to *J. N.* and other Lands to *J. S.* on Condition to pay 5 *l. per Ann.* to *J. D.* and the Queſtion was, whether theſe Lands were by the Will ſubjected to the Payment of the Teſtator's Debts, or only to the Payment of the particular Rents thereout deviſed; and the Court held, that the Lands were not ſubjected to the Payment of the Teſtator's Debts, for the general Clauſe in the Beginning of the Will, ſhall be intended only of the Perſonal Eſtate, and the pecuniary Legacies thereout deviſed. *Paſch.* 1687. between *Eyles* and *Cary*, 1 *Vern.* 457.

4. If *J. S.* deviſes his Lands to his Brother, who is his Heir at Law in Fee, and likewiſe deviſes ſeveral Legacies, and makes his Brother Executor, deſiring him to ſee his Will performed according to the Truſt and Confidence he had repoſed in him; this makes the Real Eſtate liable; for the Teſtator needed not have deviſed the Eſtate to his Brother, being Heir at Law, unleſs he intended that he ſhould take them chargeable with the Debts and Legacies. Decreed *Paſch.* 1691. between *Alcock* and *Sparhawk*, 2 *Vern.* 228. and affirmed in the Houſe of Lords.

5. *A.* deviſed in the following Words: *I do by this my Will diſpoſe of ſuch worldly Eſtate as it hath pleaſed God to beſtow upon me; firſt, I Will that all my Debts be paid and diſcharged, and out of the Remainder of my Eſtate, I give and bequeath unto my Wife* 300 *l. My Mind and Will is, that my Wife have one Moiety of what is left, after my Debts paid.* Item, *I give to my dear Brother* R. B. *a Cloſe lying in the Pariſh of* ——, *and for the remaining Part of my Eſtate, as well Real as Perſonal, I give and bequeath unto my Brother* J. B. *whom I make Executor*; and it was held clearly, that theſe Words ſubjected his Real Eſtate to the Payment of his Debts. 2 *Vern.* 690.

6. So where *A.* being ſeiſed of a Real Eſtate, and alſo poſſeſſed of ſome perſonal Eſtate, made his Will in Writing, and thereby deviſed in theſe Words: *Imprimis, I Will and Deviſe that all my Debts, Legacies and funeral Charges, ſhall be paid and ſatisfied in the firſt place.* Item, *I give and deviſe*, and then proceeds to diſpoſe of his Real and Perſonal Eſtate; the Perſonal Eſtate not being ſufficient, the Queſtion was, whether that Clauſe in this Will ſhould amount to a Charge on his Real Eſtate for the Payment of his Debts, Legacies and Funerals; and my Lord Chancellor *Cowper* was clear of Opinion, that it ſhould; for as to his Debts it was but natural Juſtice they ſhould be paid, and his Perſonal Eſtate would have been liable to the Payment thereof, whether he had given any Directions in his Will about them, or not; when therefore he wills and Deviſes that his Debts, Legacies and Funerals, ſhall be paid and ſatisfied in the firſt place, theſe Words muſt be intended to give a Preference for thoſe Purpoſes to any other whatſoever; and ſince he

does not deviſe his real or perſonal Eſtate to any Perſon in Particular for theſe Purpoſes, the Perſons who come within that Deſcription muſt be ſuppoſed to be within his View; and it muſt be taken as a Deviſe for their Benefit, preferable to any other Diſpoſition whatſoever, either of his Real or Perſonal Eſtate, and conſequently both of them are thereby made liable thereto: Decreed *Hill.* 1715. between *Trott* and *Vernon*, 2 *Vern.* 708. *S. C.* where it is ſaid, that ſome Streſs was laid on the Word *Deviſe*.

7. If Lands are deviſed to Truſtees, for the Payment of Debts and Legacies out of the Rents and Profits, the Truſtees may ſell the Land it ſelf. 1 *Vern.* 104. 2 *Chan. Ca.* 105. *S. P.* decreed.

8. But if the Deviſe be to pay Debts and Legacies out of the annual Rents and Profits, by theſe Words the Lands ſhall not be ſold. 1 *Vern.* 104.

9. If there be a Deviſe of a Sum certain, to be raiſed out of the Profits of Lands, and the Profits will not amount to raiſe the Sum in a convenient Time; *per* Lord Chancellor, it is the Law of this Court to decree a Sale. 1 *Vern.* 256. 2 *Vent.* 357.

10. *A.* deviſes that his Executors ſhall receive the Rents, Iſſues and Profits of his Perſonal Eſtate, in the firſt place, to pay 60 *l. per Ann.* to one for Life, and after that Perſon's Death, out of the Remainder of his Eſtate, his Debts being paid, to raiſe Portions for ſeveral Children, payable at Twenty-one, and Maintenance in the mean Time, and deviſes all his Lands in ſeveral Parcels to ſeveral Perſons at future Times; and the Maſter of the Rolls held, that the Lands were liable to be ſold, and that the Sales ſhould be out of all the Deviſee's Lands, unleſs the perſonal Eſtate were ſufficient, or the Rents and Profits in a reaſonable Time; and ordered an Account to be taken thereof in the firſt place. *Trin.* 1687. between *Berry* and *Askam*, 2 *Vern.* 26.

A. ſeiſed of real eſtate w^ch had been mortgaged by an ancestor by wille charged all his real estate to gether w^th his personal with the payment of his debts &c. & devised his real estate to B. for life rem^r in strict settlement. the legr £100 to a godson was to be paid out of his real estate; & made his wife Executrix. neither the mortgage or legacy are a charge on the personal estate. the mortgage was not his debt but that of the estate, & the legacy of £100 is charg'd only on the lands. And tho' Patricia paid both. she had the money refunded. Lawson v Lawson in some Proc^s. Feb^ry 27. 1785.

## (K) Of Deviſes of Things Perſonal; as Goods, Chattels, &c. by what Deſcription, and to whom good.

1. IF a Man who has Debts due to him by Bond, and who is likewiſe poſſeſs'd of a Term for Years, deviſes one Moiety of his perſonal Eſtate to his Wife, and afterwards ſeveral Legacies to other Perſons, and the Reſidue to *J. S.* the Wife ſhall have one compleat Moiety, if the other is ſufficient to pay the Debts, and ſhe ſhall have a Moiety of the Leaſe; tho' it was objected, that a Leaſe was not uſually reckoned perſonal Eſtate. Between *Lee* and *Hale*, 1 *Chan. Ca.* 16.

2. If a Man poſſeſſed of a Leaſe for Years, bequeaths ſeveral Legacies of Plate and other Goods to ſeveral Perſons, and after deviſes all the Reſidue of his Goods to his Wife, his Debts and Legacies being paid, and makes her ſole Executrix; by this Will the Leaſe paſſes to her as Legatee; for though by a Grant of *omnia Bona*, a Leaſe paſſes not, yet by the Civil Law *Bona* including all Chattels, and this being a Legacy, the Judges of the Common Law in this Caſe ought to be guided by that Law. *Cro. Eliz.* 387.

3. If a Man deviſes 1200 *l.* to *J. S.* and by general Words deviſes all his Goods, Chattels and Houſhold-ſtuff, in and about his Houſe

Houſe to the ſaid *J. S.* Money in the Houſe will not paſs, he having a particular Legacy deviſed to him. 2 *Chan. Rep.* 190.

4. Plate and Jewels will not paſs by a Deviſe of Utenſils. *Dyer* 59.

5. But by a Deviſe of Houſhold Goods, Plate will paſs. 2 *Vern.* 638.

6. If a Nobleman poſſeſſed of a Collar of SS, and of a Garter of Gold, and a Buckle annexed to his Bonnet, and of many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold, and precious Stones, deviſes all his Jewels to his Wife, and dies; the Garter and Collar of SS paſs not, becauſe they are not properly Jewels, but Enſigns of Honour and State; and the Buckle in his Bonnet, and the Buttons paſs not, becauſe annexed to his Robes; but all the other Chains, Rings, Bracelets and Jewels paſs. Earl of *Northumberland's* Caſe, upon a Reference to *Wray* and *Anderſon* C. Juſtices, *Owen* 124.

7. *J. S.* by Will deviſes thus; *Item*, my Will and Pleaſure is, that the Furniture and Pictures in my Houſes at *A. B.* and *C.* ſhall always remain there, and not in the Power of my Executors to diſpoſe of, but ſhall go, with my ſaid Houſes, to ſuch of my Grandchildren as ſhall be in the Poſſeſſion thereof; and then appoints that the Plate guilt with Gold belonging to his Chapel at ——, together with the Ornaments thereof, ſhould remain to the perpetual Uſe of the ſaid Chapel, and makes *D.* Executor; to whom he gives all his perſonal Eſtate, except what is before bequeathed, of what Nature or Kind ſoever, for his own proper Uſe; and the Queſtion was, if the Plate the Teſtator conſtantly uſed, and removed with him, when he went from one Houſe to another, ſhould go to the Executor by the laſt Clauſe, or belong to the Houſes, under the Word *Furniture*; and my Lord *Keeper* was of Opinion, that *Furniture* in a large Houſe takes in Plate, but not here, becauſe he diſtinguiſhes the Chapel Plate from the Furniture; and the Plate of ordinary Uſe, that was carried with him, could no more be ſaid the Furniture of one Houſe than of the others, and he meant only the particular Furniture of each Houſe; ſo the Plate went to his Executors, and liable to the Plaintiffs, who were Creditors. *Mich.* 1705. between *Franklin* and the Earl of *Burlington*; *vide* 2 *Vern.* 512. *S. C.* where it is ſaid to have been adjudged, that the Plate paſſed by the Deviſe of his Furniture and Pictures. *Sed Q.*

8. If a Man deviſes his Houſe, and all his Goods and Furniture therein, to his Wife for Life, and after her Deceaſe to his Son *R.* and his Heirs, except his Pictures, which he gives to his Sons *A.* and *B.* and he has Pictures in Boxes, as well as thoſe hung up in the Houſe, and likewiſe Pictures at his Death, which he had not at the Time of the making the Will; and it is proved in the Cauſe, that he had Skill in Pictures, and frequently bought Pictures, and ſold them again; the Exception of the Pictures ſhall extend, as well to the Pictures hung up as Furniture, as to thoſe in Boxes, and as well to thoſe in the Houſe at the Time of the Will, as to thoſe bought in after the Will made; ſo that they ſhall paſs to his Sons *A.* and *B.* *per* Lord *Keeper*, *Hill.* 1705. between *Gayre* and *Gayre*, 2 *Vern.* 538.

9. If a Man deviſes to his Wife all his perſonal Eſtate at a Place called *W.* all his perſonal Eſtate, as Coaches, Horſes, *&c.* there at

the Time of his Death ſhall paſs, tho' not there at the Making of the Will, the perſonal Eſtate being fluctuating and varying until the Time of the Teſtator's Death. *Mich.* 1714. between *Sayer* and *Sayer*, 2 *Vern.* 688. *per Curiam*, *vide Swinb.* 418.

10. But if *J. S.* deviſes all his Houſhold Goods and Furniture, which ſhould be in his Houſe at *R.* at his Death to the Wife, and afterwards going beyond Sea, his Steward gets the Head Landlord of the Houſe to accept of a Surrender of the Leaſe of the Houſe, and removes the Goods to another Houſe, and writes an Account of this to *J. S.* who approves of it; the Goods will not paſs by the Will to the Wife; otherwiſe, if they had been removed by Fraud to defeat the Legacy, or by any tortious Act, without the Privity of the Teſtator: Decreed *Hill.* 1716. between the *Earl* and *Counteſs* of *Shaftsbury*, 2 *Vern.* 747.

11. So if a Man deviſes to his Son the Furniture of his Houſe at *D.* and two Years afterwards orders Goods which he had bought in *London*, to be carried to his Houſe at *D.* and agrees with Carriers for that Purpoſe, but dies before the Goods are removed from *London*; theſe Goods ſhall not paſs by the Will, as Part of the Furniture of the Houſe at *D.* Decreed *Hill.* 1716. between the Duke of *Beauford* and Lord *Dundonald*, 2 *Vern.* 739.

12. A Man deviſed all the Arrears now due, and unjuſtly detained from me by the *Dean* and *Chapter* of *York*, to be employed in a certain Charity; and the Queſtion was, whether the Arrears incurred after the Making of the Will, and a ſmall Time before the Death of the Teſtator, and which were never demanded by the Teſtator, ſhould paſs; and *per* Lord *Keeper* not; for tho' a general Deviſe of all a Man's Goods will carry all he had at his Death, tho' purchaſed after the Making his Will; yet here it is confined to the Arrears due at the Making the Will: Decreed *Trin.* 1701. between the *Attorney General* and *Bury*.

13. If a Man deviſes his Silver Tea-kettle and Lamp, with the Appurtenances, nothing ſhall paſs but the Kettle and Lamp, and the Box wherein the Lamp was placed, and not the Silver Tea-pot, Milk-pot, Tongs, Strainer or Caniſters: Reſolved at the *Rolls*, *Mich.* 1728. in a Caſe between *Hunt* and *Berkley*.

14. A Man deviſed to his Niece all his Goods, Chattels, Houſhold-Stuff, Furniture, and other Things which then were, or ſhould be in his Houſe at the Time of his Death, and ſome Time after died, leaving about 265 *l.* in ready Money in the Houſe; and it was decreed, that this ready Money did not paſs; for by the Words *other Things* ſhall be intended Things of like Nature and Species with thoſe before mentioned. *Mich.* 1729. between *Trafford* and *Berrige*.

15. If a Man deviſes 40 *l.* to be paid *J. S.* by him to be diſpoſed of, in ſuch Manner as the Teſtator ſhould by a private Note acquaint him with, and dies; without ſuch Appointment this is a good Bequeſt to the Party: Decreed *Paſch.* 20 *Car.* 2. between *Martin* and *Clerk*, 2 *Chan. Ca.* 198.

16. If one deviſes his Lands to *B.* in Fee, paying 400 *l.* whereof 200 *l.* to be at the Diſpoſal of his Wife, by her laſt Will, to whom ſhe ſhall think fit; and the Wife dies Inteſtate, her Adminiſtrator ſhall have this 200 *l.* the Property thereof being abſolutely veſted in

the Wife: Decreed *Mich.* 1690. between *Robinſon* and *Duſgale*, 2 *Vern.* 181.

17. If one deviſes his Lands for the Payment of his Debts and Legacies, and deviſes 400 *l.* a-piece to two of his Siſters, and to his Third as much as his Executor ſhould think fit; the Third ſhall have 400 *l.* alſo, and be made equal to her other Siſters, if the Eſtate will hold out: Decreed *Trin.* 1690. between *Warcham* and *Brown*, 2 *Vern.* 153.

18. If Money is deviſed to younger Children, where there are divers Daughters and a Son, who by Birth is a younger Child, but is Heir at Law to a fair Inheritance, he ſhall not be conſidered as a younger Child, ſo as to take by the Deviſe. 12 *Car.* 2. between *Bretton* and *Bretton*, 3 *Chan. Rep.* 1. 1 *Chan. Rep.* 224. *S. P.* decreed.

19. If a Man deviſes Lands to be ſold for the Increaſe of Childrens Portions, a Child born ſince the Will ſhall have a Share. 2 *Chan. Rep.* 211.

20. So where one deviſed 20 *l.* a-piece to all the Children of his Siſter *B.* and the Queſtion was, whether a Child born after the making of the Will, and before the Death of the Teſtator, ſhould take by Virtue of the Deviſe; and the Court decreed it to extend to the after-born Child; the Word Children comprehending all. *Trin.* 1689. between *Garbland* and *Mayot*, 2 *Vern.* 105. but if it had been to the Children by Name, *Q. & vide Dyer* 177. 1 *Inſt.* 112. *b.*

21. A Man by Will deviſed all his Goods in ſuch a Houſe to *G.* for Life, and after his Deceaſe to the Heir of *J. S.* and the Point was, whether he that was Heir of *J. S.* ſhould take theſe Goods as Deviſee, and the ſaid Goods go to his Executors; altho' ſuch Heir die in the Life-time of *G.* or whether he that was Heir to *J. S.* at the Time of *G.*'s Death ſhould have them; and tho' it was urged, that theſe Goods were only the Furniture of the Capital Houſe, yet my Lord Chancellor was of Opinion, that they abſolutely veſted in him that was Heir of *J. S.* at the Time of his Death; and decreed accordingly, between *Danvers* and the Earl of *Clarendon*, 1 *Vern.* 35.

22. A Man deviſed his Eſtate to his Wife for Life, and after her Deceaſe to his Son *T.* his Heirs and Aſſigns for ever; provided if *T.* died without Iſſue of his Body, then he bequeathed unto his Daughters *M.* and *E.* 200 *l.* to be equally divided between them, and to be paid out of his Eſtate, within ſix Months after the Deceaſe of the Survivor of the Wife and Son; the Wife died, and *T.* died, leaving Iſſue, who died within three Months after the Father; and the Court held, that this perſonal Legacy could not be intended to ariſe upon any remoter Contingency, than that of *T.*'s dying without Iſſue living at his Death; and therefore diſmiſſed the Bill, which ſought the Benefit of it. *Trin.* 1712. between *Nichols* and *Hooper*, 2 *Vern.* 686.

23. If *A.* deviſes 1500 *l.* in Truſt for the Children of *B.* and *B.* has only one Child, and ſeveral Grandchildren, the Child only ſhall take, and the Grandchildren ſhall not come in for Shares; but if *B.* had not a Child living, the Grandchildren might have taken by the Name of Children. *Vide* 2 *Vern.* 106.

24. If a Man deviſes the Surplus of his Eſtate to his Grandchildren, living at his Death, Grandchildren born after his De-

ceaſe ſhall not take; for if he had ſo intended it, he would not have reſtrained it to Children living at his Death: Decreed *Hill.* 1715. between *Muſgrave* and *Parry*, 2 *Vern.* 710.

25. If one deviſes the Surplus of his perſonal Eſtate to the Children of *A.* and *B.* and neither of them has a Child at the Making of the Will, or the Death of the Teſtator, the Deviſe is Executory, and ſhall extend to any Children that *A.* and *B.* ſhall afterwards have, and the Children of each ſhall take *per Capita*, and not *per Stirpes*; they claiming in their own Right, and not as repreſenting their Parents; *per Curiam. Mich.* 1715. between *Weld* and *Bradbury*, 2 *Vern.* 405.

26. The Duke of *Bolton* by his Will deviſed in theſe Words, *viz.* Item, *I give and bequeath unto ſuch of my Servants, as ſhall be living with me at the Time of my Death, one Year's Wages.* *Per* Lord *Keeper*, Stewards of Courts, and ſuch who are not obliged to ſpend their whole Time with their Maſter, but may alſo ſerve any other Maſter, are not Servants within the Intention of the Will; but I will not narrow it to ſuch Servants only that lived in the Teſtator's Houſe, or had Diet from him. 2 *Vern.* 546, 547.

## (L) When a Deviſe ſhall be in Satisfaction of a Thing due.

1. *J. S.* upon his Wife's joining with him in the Sale of Part of her Jointure, gave a Note to pay her 7 *l.* 10 *s. per Ann.* for her Life; and upon a ſecond Sale of a farther Part of her Jointure, gave her a Bond to pay her 6 *l.* 10 *s. per Ann.* for her Life; and afterwards by Will, without taking Notice either of Bond or Note, deviſed unto her 14 *l. per Ann.* for Life; and it was held, that the Deviſe ſhould be in Lieu and Satisfaction of the Bond and Note. *Paſch.* 1705. between *Brown* and *Dawſon*, 2 *Vern.* 498. *per Cur'.*

2. So if *A.* by Marriage-Articles agrees to leave his Wife 800 *l.* and her Jewels, *&c.* but it is declared, that notwithſtanding the Articles, ſhe ſhould not be debarred of any Thing he ſhould give her by Will; and *A.* by Will makes a Diſpoſition of his whole Eſtate among his Children, *&c.* and gives his Wife 1000 *l.* the Wife muſt waive the Articles, or the Will, for ſhe cannot have both; for his Making a Diſpoſition of the whole Eſtate ſhews, that he intended, that every Part ſhould be performed. *Paſch.* 1706. between Lady *Herne* and *Herne*, 2 *Vern.* 555.

3. But if *A.* gives a Bond to *B.* her Servant, to pay her 20 *l. per Ann.* quarterly for her Life, free from Taxes; and by Will, without taking notice of the Bond, gives *B.* 20 *l. per Ann.* for her Life payable Half-yearly, but not ſaid free of Taxes; *B.* ſhall have both the Annuities, for that by the Will not being ſo advantageous as the firſt, cannot be preſumed a Satisfaction: Decreed *Hill.* 1704. between *Atkinſon* and *Webb*, 2 *Vern.* 478.

4. So where *A.* on his Marriage covenanted to purchaſe, and ſettle a Jointure of 20 *l. per Ann.* on his intended Wife; and if he died before ſuch Purchaſe or Settlement made, ſhe ſhould have 300 *l.* out of his Eſtate for her own Uſe; the Marriage was had, and the Husband died before any ſuch Settlement was made; but by his Will he deviſed to his Wife 330 *l.* for her Life, with Power to diſpoſe

poſe of 30 *l.* Part thereof at her Death; and it was held *1ſt*, That ſhe had a Right to 300 *l.* and Intereſt, and that the Executor could not now be at Liberty to ſettle 20 *l. per Ann.* as the Teſtator might have done. *2dly*, That ſhe ſhould have the 330 *l.* as an additional Bounty, and Proviſion for the Wife: Decreed *Trin.* 1705. between *Perry* and *Perry*, 2 *Vern.* 505.

5. By a Marriage-Settlement the intended Husband was made Tenant in Tail, and a Proviſion was made of 3000 *l.* a-piece for the Daughters; the Husband afterwards docked the Intail, and deviſed to the Daughters 3000 *l.* a-piece; and it being proved, that the Teſtator had declared after making the Settlement, that he would add to his Daughters Portions; and it being urged, that the Cutting of the Intail was for this Purpoſe; the Court decreed the Daughters both Sums. 13 *Car.* 2. between *Pile* and *Pile*, 1 *Chan. Rep.* 199.

6. By a Marriage-Settlement, in Caſe of Failure of Iſſue Male, a Remainder of the Eſtate was limited to Daughters, until they ſhould raiſe 3000 *l.* for Portions; there was Iſſue of the Marriage, a Son and two Daughters; the Father deviſed 700 *l.* a-piece to the Daughters, and died; the Son afterwards made his Will, and deviſed to the Daughters to the Amount of 7000 *l.* without mentioning of its being in Lieu or Satisfaction of any Thing due to them, and gave his Land to his Heirs Males, and died without Iſſue; and it was held clearly, that the Father's Legacy could be no Satisfaction, not being adequate in Value; beſides the Father had then a Son living, and it was altogether contingent and uncertain, whether 3000 *l.* would ever ariſe, and become payable or not; and therefore it was but reaſonable, that the Father ſhould make ſome certain Proviſion for his Daughters; but as to the Son's Legacy of 7000 *l.* it was, by two Lords Commiſſioners againſt *Rawlinſon*, decreed a Satisfaction; but upon an Appeal to the Lords, the Decree was reverſed; for the Daughters being Heirs at Law, and diſinherited, there was no Ground for the Court to make a ſtrained Conſtruction to their Prejudice, in Favour of a voluntary Deviſee. *Paſch.* 1692. between *Duffield* and *Smith*, 2 *Vern.* 258.

7. *A.* on the Marriage of his Daughter, gave a Bond to the Huſband for the Daughter's Portion, and afterwards by Will deviſed Land of much greater Value to the Husband and Wife, and their Heirs, and died; and there being a Defect of Aſſets to pay Debts, the Queſtion was, whether the Deviſe of thoſe Lands ſhould be a Satisfaction; and the Court held that Caſes of this Nature depend upon Circumſtances; and that where a Legacy has been decreed to go in Satisfaction of a Debt, it was grounded upon ſome Evidence, or at leaſt a ſtrong Preſumption, that the Teſtator did ſo intend it; but there is no Room for that in this Caſe, it plainly appearing, the Teſtator intended to give all he could to his Son-in-Law and Daughter, and defraud his Creditors; and therefore the Deviſe of the Land muſt not be in Satisfaction of the Bond-Debt. *Trin.* 1693. between *Goodfellow* and *Burchett*, 2 *Vern.* 298.

8. *H.* owed his Niece *A.* 100 *l.* by Bond, and having two other Nieces *B.* and *C.* makes his Will, and bequeaths 300 *l.* to his Niece *A.* and to his other two Nieces 200 *l.* a-piece; after that he borrowed another 100 *l.* of his Niece *A.* and being indebted to her 200 *l.* died; and to prove, that the 300 *l.* ſhould go in Satisfaction of the Debt, it was inſiſted upon as a Rule in Equity, that where the Teſtator

being indebted, gives his Debtee a Legacy greater than his Debt, it ſhall go in Satisfaction; for a Man ſhall be intended to be juſt before he is kind; otherwiſe where a Legacy is leſs, for that is neither to be juſt nor kind, and ſhall not be taken to go in Satisfaction of any Part. But *per Cowper* Lord *Chancellor*, it might be as good Equity to conſtrue him to be both juſt and kind, if he intended to be both; that if any Part of this 300 *l.* be applied to the Payment of the Debt, as for ſo much it is not a Gift; whereas a Legacy muſt be taken to be a Gift or Gratuity; and there being Aſſets, and ſome Proofs of the Teſtator's greater Kindneſs to *A.* than his other Nieces, his Lordſhip decreed her the whole 300 *l.* over and above her Debt. *Mich.* 6 *Ann.* between *Cuthbert* and *Peacock*, 1 *Salk.* 155. *Vid.* 2 *Salk.* 508, where my Lord *Harcourt* reverſed a Decree of the Maſter of the Rolls, upon the Circumſtances of the Caſe, and Intention of the Party; that the Legacy tho' greater, ſhould not be a Satisfaction for what is due to the Debtee.

9. *A.* by Will gave ſix ſeveral Annuities for Lives, three of 10 *l.* each, and three of 5 *l.* each, to be paid out of his perſonal Eſtate, and gave all the reſt of his real and perſonal Eſtate to *E.* his Wife, whom he made ſole Executrix; the Annuitants were his Siſters, and their Children; and about two Years after, the Wife makes her Will, and gives two Annuities of 5 *l.* each to two of the 5 *l.* a Year Annuitants in her Husband's Will, but gives them to them and their Heirs, in caſe they happen to over-live ſuch a one, who by her Husband's Will had 10 *l. per Ann.* for Life; ſhe likewiſe gives another Annuity of 10 *l. per Ann.* to one and her Heirs, and another of 5 *l. per Ann.* to another and her Heirs, who had each of them the like Annuities for Life by the Husband's Will; but in the Diſpoſition of theſe Annuities, ſhe takes no manner of Notice of her Husband's Will, or that they had any Annuities thereby given them; and the only Queſtion was, whether the four Annuities given to the Perſons in Fee by the Wife's Will, ſhould be taken to be only in Satisfaction of the like Annuities for Life, given to the ſame Perſons by the Husband's Will; and it was argued that they ſhould; becauſe the Husband's Annuities being payable only out of his perſonal Eſtate, and the Wife being his Executrix, ſhe was in the Nature of a Debtor for them; and where-ever a Perſon by his Will gives a Legacy, as great or greater than the Debt he owes to the Legatee, it has been always taken to be a Satisfaction of the Debt; but *per* Lord Chancellor, this Doctrine has already been carried too far, and he would never carry it farther; for though it is true, a Man ought to be juſt, before he is bountiful, and therefore ſhall be preſumed to pay a Debt, rather than give a Legacy to the ſame Perſon, when it is the ſame Sum, or more than he owes him; yet why may he not be both juſt and bountiful, when there are Aſſets to anſwer both; as in the preſent Caſe; and there can be no Pretence to ſay, that the two firſt Annuities of 5 *l.* each can be a Satisfaction of the like Annuities given by the Huſband, becauſe they are given upon the Contingency of over-living ſuch a one; which has not yet happened, and poſſibly never may; and then ſhall the Annuities for Life which are certain, be extinguiſhed, by giving the ſame Perſons Annuities in Fee on a Contingency which may never happen? and if that be ſo, as to theſe Annuities, there is no Reaſon to imagine the Wife had a different Intention as to the others, or that ſhe intended two of them ſhould go in Satisfaction

of the like Annuities given by her Husband, and the other Two not; and the Caſes where a Legacy has been held to be a Satisfaction of a Debt, are, where the Debt was owing by the ſame Perſon who gave the Legacy; but if ſuch Legacy be given upon a Contingency, or to take Place at a future Day, it is no Satisfaction of the Debt; and therefore in the Principal Caſe it was decreed, that the Annuities given by the Wife were diſtinct additional Annuities, and not an Enlargement only of the Husband's Annuities, from an Intereſt for Life to an Intereſt in Fee, as it was urged to be, and therefore ſhould go in Satisfaction of thoſe Annuities; which the Court held they ſhould not; but that the Annuitants ſhould take both. *Trin.* 1729. between *Crompton* and *Sale*, *at my Lord Chancellor's.*

## (M) Of void Deviſes.

1*ſt*, By Deviſing what the Law already gives, or what the Policy of the Law will not admit.
2*dly*, By Incertainty in the Deſcription of the Thing deviſed.
3*dly*, By Incertainty in the Deſcription of the Perſon to take.
4*thly*, By the Deviſee of Lands dying in the Life-time of the Deviſor.

### 1ſt, By Deviſing what the Law already gives, or what the Policy of the Law will not admit.

1. IF a Deviſe be made to *J. S.* and his Heirs, who is Heir at Law to the Deviſor; this is a void Deviſe, and the Heir ſhall take by Deſcent as his better Title, for the Deſcent ſtrengthens his Title, by taking away the Entry of ſuch as may poſſibly have Right to the Eſtate; whereas if he claims only by Deviſe, he is in by Purchaſe. 1 *Rol. Abr.* 626. *Hob.* 30. *Plowd.* 545. *Godb.* 461.

2. So if a Man deviſes Lands to his Wife for Life, Remainder to *J. S.* who is Heir at Law in Fee, this is a void Deviſe to *J. S.* becauſe, after the Diſpoſition of the particular Eſtate, the Reverſion would have gone without any farther Diſpoſition in the ſame Manner it is now limited by the Will. 2 *Leon.* 101. 1 *Rol. Abr.* 626. *Hob.* 30.

3. *A.* ſeiſed of Lands on the Part of his Mother, deviſes them to his Executors for ſixteen Years, for Payment of his Debts, and after deviſes them to his Heir at Law *ex parte Materna*; this is a void Deviſe to the Heir at Law; for tho' it was urged to ſupport the Deviſe, that if it obtained, the Heir of the Part of the Father might in the End inherit, which he could never do, if the Deviſe be rejected; yet the Court adjudged the Deviſe void, becauſe this is no Alteration made in the Tenure of the Eſtate, nor is the Quality thereof any Way altered; but whether the Deviſee taketh by the Will, or by Deſcent, it is a Fee-ſimple; and it were but *actum agere* to make him take by Will. Between *Hedger* and *Rowe*, 3 *Lev.* 127.

4. But where another Eſtate is created by the Will, than would deſcend to the Heir at Law, or where the Quality of the Eſtate is altered by the Deviſe, there the Diſpoſition of the Will ſhall prevail,

tho' it be made to the Heir at Law. *Moor* 680. *Godol.* 461. 1 *Rol. Abr.* 610. *Hob.* 30.

5. As where a Man had Iſſue a Son and a Daughter, and deviſed that his Land ſhould deſcend to his Son, and if he died without Iſſue of his Body, then the Land to go over, *&c.* the Son by this Deviſe took an Eſtate-tail, though Heir at Law to the Deviſor, becauſe here is an Eſtate-tail created by the Will, and the Heir muſt claim under the Will, or the Remainder will be void. *Hob.* 30. 1 *Rol. Abr.* 610.

6. So where a Man has Iſſue only three Daughters, and deviſes his Land to them and their Heirs, this is a Deviſe to the Heir at Law, and yet good, becauſe the Deviſe makes them Jointenants, in which Survivorſhip takes Place; whereas had they taken by Deſcent, they had been Copartners; and the Will altering the Generality of the Eſtate ought to prevail. 3 *Lev.* 128.

7. If a Man deviſes Land in Fee to *A.* and if he dies without Heirs, then *M.* ſhall have it, the ſecond Deviſe is void, for a Fee cannot depend on a Fee; for no Man can ſay when the Heirs of *A.* will fail, and to allow the Remainder to *M.* good, upon ſuch a diſtant Contingency, is to perpetuate the Eſtate in the Family of *A.* and yet preſerve a Remainder or Intereſt in *M.* which very poſſibly may never veſt; and as theſe Eſtates are unalienable, tho' all Mankind joined in the Sale; therefore the Reaſon and Policy of the Law will not ſuffer them to have a longer Duration than a Life or Lives *in eſſe*, and wearing out together, or the Term of twenty or thirty Years: But for this *vid.* Letter (F).

8. *A.* deviſed his Manors, Meſſuages, *&c.* to the *Drapers Company* and their Succeſſors, upon Truſt, to convey to *B.* for Life, and to his firſt Son, and all other his Sons for Life, and to their Iſſue Male for Life, and for Want of ſuch Iſſue, to *J. S.* for Life, and to his Iſſue Male for Life, *&c.* and ſo to a great Number of them for Life; and ſo to convey *toties quoties*; and the Court held this Attempt to make a perpetual Succeſſion of Eſtates for Life to be vain and impracticable; however, that there ought to be a ſtrict Settlement made, and the Intent of the Teſtator followed, as far as the Rules of Law will admit of; and therefore directed a Settlement to be made ſo, that ſuch who were in Being ſhould be only Tenants for Life; but where the Limitation was to a Son not in Being, there he muſt be made Tenant in Tail Male. *Hill.* 1716. between *Humerſton* and *Humerſton*, 2 *Vern.* 737. *Prec in Ch. 455. Gilb. C. in Eq. 128*

9. *A.* deviſed all the Reſt of his Perſonal Eſtate by Leaſes, in Truſt, or otherwiſe, to his three Nephews, *A. B.* and *C.* and makes them Executors, and Wills, that they ſhall give Bond to each other, that in Caſe either die without Iſſue of his Body, to leave at their Death all the ſaid Chattels and Perſonal Eſtate to the Survivors and Survivor of them; and the Bill was to have the ſaid Bonds given, but was diſmiſs'd, being an Attempt to intail a Perſonalty. *Trin.* 1703. between *Williams* and *Williams*.

### 2dly, By Incertainty in the Deſcription of the Thing deviſed.

1. If a Man being ſeiſed of Lands within a Borough where Lands by Cuſtom are deviſeable by Parol, Deviſes in theſe Words; *I give all*

*all to my Mother, all to my Mother*; the Lands paſs not, for the Words are too (*a*) uncertain, and not ſufficient to diſinherit an Heir. Between *Bowman* and *Milbank*, 1 *Lev.* 130.

(*a*) Deviſes are void and rejected where the Words of the Will are ſo general and uncertain, that the Teſtator's Meaning cannot be collected from them; according to that Rule; as the Heir at Law has a plain and uncontroverted Title, unleſs the Anceſtor diſinherits him, it were ſevere and unreaſonable to ſet him aſide unleſs ſuch Intent of the Teſtator is evident from the Will, for that were to ſet up and prefer a dark, or at leaſt a doubtful Title, to a clear and certain one; but as it is likewiſe a Rule in the Conſtruction of Wills, not to reject any Words in the Will which can have a Signification; theſe two have been the Occaſion of ſeveral Doubts and Reſolutions concerning the Intention of the Teſtator, about the Diſpoſing of his Eſtate, whether he meant his Real or Perſonal, or what Part of either of which he intended to paſs by the Words of the Will.

2. If one having Lands in Fee, and other Lands for Years, deviſes all his Lands and Tenements, the Fee-ſimple Lands only paſs; but if a Man had Leaſes for Years only, and no Fee-ſimple Lands, by the Deviſe of all his Lands and Tenements, the Leaſes for Years paſs; for otherwiſe the Will ſhould be meerly void. *Cro. Car.* 293. *per Curiam.*

3. So if a Man being ſeiſed of a Meſſuage in *A.* and of a Meſſuage and ſeveral Lands in *B.* deviſes to *J. S.* his Houſe in *A.* with all other his Lands, Meadows, Paſtures, with all and ſingular their Appurtenances whatſoever in *B.* yet the Houſe in *B.* ſhall not paſs; for tho' by a Feoffment or Leaſe of Lands in *D.* Houſes will paſs, becauſe to be taken moſt ſtrongly againſt the Feoffor, *&c.* and the Land paſſing, the Houſe thereupon muſt alſo paſs; yet Wills are to be taken according to the Intention of the Deviſor; and when he deviſes his Houſe in *A.* and Lands in *B.* it cannot be preſumed that he would have more paſs than by the Words is expreſſed. 2 *And.* 123.

4. If a Man is ſeiſed of Lands in a Vill, and in *A.* and *B.* two Hamlets within the ſame Vill, and deviſes all his Lands in the Vill, and in *A.* and dies, no Part of the Land in *B.* ſhall paſs; for his naming one Hamlet only, fully ſhews his Intent, that the Lands in the other ſhould not paſs. *Dyer* 261.

5. But where a Man having two ſeveral Moieties of Lands by Purchaſe of the ſame Perſon, one lying in *Kent*, and the other in *Eſſex*, and he deviſed all his Moieties in *Kent*; and it was held that both paſſed; for the Words being, *all his Moieties*, they cannot be ſatisfied with one Moiety only. 1 *Bulſt.* 117. 2 *Bulſt.* 176. *Hob.* 173. *vid. Noy* 112. *Cro. Eliz.* 658.

6. If one ſeiſed of Lands called *Hayes-Land*, lying in two Vills, *viz. A.* and *B.* deviſes all his Land in *A.* called *Hayes-Land*, to his youngeſt Son and his Heirs, and in another Part wills, that if his ſaid Son dies without Iſſue, that his Wife ſhall have *Hayes-Land*, and dies; and the Son dies without Iſſue, the Wife ſhall only have that Part of *Hayes-Land* which lies in *A.* becauſe no more was deviſed to the Son. *Cro. Eliz.* 674. But *per Popham*, if the Deviſe had been to the eldeſt Son, and if he dies without Iſſue, *&c.* perhaps ſhe ſhould have had all, becauſe the eldeſt Son had all, Part by Deviſe and Part by Deſcent.

7. If a Man ſeiſed in Fee of two Houſes in *D.* adjoining the one to the other, and the one is in the Poſſeſſion of *A.* and the other in the Poſſeſſion of *B.* which is alſo the Corner-houſe in the Street of the Town, and he deviſes his Corner-houſe in the Poſſeſſion of *A.* and *B.* by theſe Words, only the Houſe, which is in the Poſſeſſion of *B.* ſhall paſs, which is the Corner-houſe, and not the other Houſe which

is in the Poſſeſſion of *A.* though it be next adjoining thereto, for his Intent appears to be ſo. 1 *Rol. Abr.* 613, 614. *Cro. Car.* 447. *vide Stile* 261.

8. *A.* ſold Lands to *B.* but before a Conveyance was executed, *B.* ſold the ſame Lands to *C.* and then *A.* conveyed to *C.* and *C.* being thus ſeiſed, deviſed the Land to his younger Son in theſe Words, *I bequeath to* R. *my Son all my Land which I purchaſed of* B. whereas in Strictneſs of Law he purchaſed them from *A.* who conveyed them to him; yet this was allowed to be a ſufficient Deſcription of the Land, and conſequently a good Deviſe of it, becauſe the Purchaſe was really made from *B.* the Money being paid to him. Between *Thorp* and *Thompſon*, 2 *Leon.* 120.

9. If one deviſes his Houſe wherein *J. S.* dwells, called the *White Swan* in *Old-Street*, to *J. N. &c.* and dies, and at the Time of his Death and making of the Will, *J. S.* occupied the Entry only, and three of the upper Rooms of the Houſe, and others occupied the Garden and other Parts of the Houſe; yet all the Houſe paſſes, for the Houſe imports the whole Houſe, and the Sign of the *White Swan* makes it ſtill more certain. *Cro. Car.* 129. 1 *Jon.* 195. *S. C.*

10. If a Man is ſeiſed of a Meſſuage and two Acres of Land in *A.* and of two Acres of Meadow in *B.* and hath uſed and occupied the two Acres of Meadow, being four Miles diſtant from his ſaid Houſe, together with his ſaid Houſe and Lands in *A.* and deviſes the Houſe *cum omnibus & ſingulis pertinentiis ſuis adinde ſpectant'* to *J. S.* the two Acres of Meadow ſhall not paſs; for by the Words *cum pertinentiis* Lands paſs not, but ſuch Things only as may be properly appertaining; otherwiſe if the Words had been *cum terris pertinentibus*, for then the Lands uſed therewith ſhould have paſſed. *Cro. Car.* 57.

11. If *A.* deviſes ſeveral pecuniary Legacies, and alſo ſome Lands, and then deviſes all the Reſt and Reſidue of his Money, Goods and Chattels, and other Eſtate whatſoever, to *J. S.* whom he makes Executor, he having other Lands, they ſhall paſs by the Will. Decreed *Trin.* 27 *Car.* 2. between *Tirrel* and *Page*, 1 *Chan. Ca.* 262.

12. But if a Man ſeiſed in Fee of three Tenements, and poſſeſſed of divers Goods, and of a Leaſe for Years, deviſes one Tenement to one of his Sons, and another Tenement to one of his Daughters, and then adds: *Item, I make my two Sons Executors of all my Goods moveable and immoveable, and all my Lands, Debts, Duties and Demands*; by this Clauſe no Eſtate in the three Tenements, of which the Deviſor was ſeiſed in Fee, paſſed to the Executors by Force of the Words, *and all my Lands*, becauſe that theſe Words might well be ſatisfied by the Leaſe for Years of Land, which paſſed by it. 1 *Rol. Abr.* 613.

13. *A.* deviſed in the following Manner: *I make my Niece Executrix of all my Goods, Lands and Chattels*; the Teſtator had a Real and Perſonal Eſtate, but no Leaſes or Intereſts for Years in any Lands whatſoever; and the Queſtion was, whether any, or what Eſtate paſſed in the Lands by this Deviſe; and my Lord Chancellor was clear of Opinion, that the Real Eſtate did not paſs by thoſe Words; and that the Word *Lands* was not (as objected) uſeleſs, and to be rejected, for that in all Probability there might be Rents in Arrear of thoſe Lands which would paſs to the Niece by her being

made Executrix. *Paſch.* 1717. between *Piggot* and *Penrice*, decreed.

14. If *A.* deviſes certain Lands to his youngeſt Son in Fee, and deviſes all his Lands in *D.* to his Wife for Life: *Item*, I give to her for Life the Lands which I hold of *G. T. Item*, I give to her all the Lands which I purchaſed of *J. S. Item*, I give my Lands to my Son *E.* and his Heirs for ever; not only the Lands purchaſed of *J. S.* but alſo the Reverſion of all the others do paſs by theſe Words: Adjudged 35 *Car.* 2. between *Barrow* and *Gameam*, *Skin.* 130.

15. If *A.* being ſeiſed of the Manor of *A.* and of other Lands in the County of *S.* deviſes the Manor of *A.* for ſix Years, and Part of the other Lands to *J. S.* in Fee, and then comes this Clauſe, And the Reſt of my Lands in the County of *S.* or elſewhere, I give to my Brother, *&c.* by this Deviſe he ſhall have the Reverſion of the Manor. *Allen* 28.

16. If *A.* ſeiſed in Fee deviſes ſeveral Houſes to a Charitable Uſe, and deviſes a Meſſuage to *J. S.* for Life, and by another Clauſe deviſes to his Wife, the better to enable her to pay his Legacies, all his Meſſuages, Lands, Tenements and Hereditaments, *not above diſpoſed of*; this will paſs the Reverſion of the ſaid Meſſuage, though it was found that the Wife had ſufficient to pay the Legacies. *Mich.* 1 *W. & M.* between *Willows* and *Lydcot*, 2 *Vent.* 285. Adjudged upon a Writ of Error in the Exchequer Chamber, and the Judgment given in *B. R.* reverſed. 1 *Lev.* 212. *S. P.* adjudged; *vide* the Caſe of *Hyley* and *Hyley*, 3 *Mod.* 228. which ſeems *cont'*, but has been denied to be Law in ſeveral of the following Caſes.

17. *J. S.* ſeiſed in Fee deviſed *Black-acre* to *A.* for Life, and deviſed to *B.* all his Lands not before deviſed to be ſold, and the Money to be divided between his younger Children; the Queſtion was, whether the Reverſion of *Black-acre* paſt by the Deviſe of all his Lands not before deviſed; and it having been referred to the Judges of the Common Pleas, they unanimouſly agreed, and certified that the Reverſion was well deviſed; and it was decreed accordingly. *Hill.* 1703. between *Rooke* and *Rooke*, 2 *Vern.* 461.

18. *A.* by Virtue of ſeveral Settlements, being Tenant in Tail, after Poſſibility of Iſſue extinct, of ſome Lands, Remainder in Fee to Truſtees, in Truſt for him and his Heirs; and as to ſome other Lands, being Tenant for Life, Remainder to his firſt and other Sons, Remainder to Truſtees in Fee, in Truſt for the right Heirs of *B.* whoſe Heir *A.* was; and as to other Lands, being Tenant in Tail, Remainder to the right Heirs of his Father, whoſe Heir he likewiſe was; and being likewiſe ſeiſed of a very conſiderable Real Eſtate of his own Purchaſe, and poſſeſſed of a large Perſonal Eſtate, made his Will, and deviſed ſome Part of his Lands to his Wife for Life, and gave ſeveral Legacies; and having no Iſſue deviſed all other his Lands, Tenements and Hereditaments, *out of Settlement*, to his Nephew, provided he took on him his Surname, ſubject to raiſe 4000*l.* in Caſe the Teſtator left a Daughter; and it was held by my Lord *Chancellor*, aſſiſted with the *Maſter* of the *Rolls*, *Trevor* Ch. Juſt. and Juſt. *Tracy*, that all the Eſtates thus ſettled paſſed by the Will, notwithſtanding the Words, *out of Settlement*; for the Word *Hereditament* comprehends a Remainder or Reverſion, as well as an E-

ſtate in Poſſeſſion. Decreed *Mich.* 1708. between Sir *Litton Strode* and Lady *Ruſſel*, 2 *Vern.* 621.

19. So where *A.* being ſeiſed in Fee of Lands in *D.* upon the Marriage of his eldeſt Son, ſettled thoſe Lands on him in Tail Male, Remainder to his own right Heirs; and being ſeiſed in Fee in Poſſeſſion of other Lands in *M. L.* and *N.* deviſed all his Meſſuages, Lands, Tenements and Hereditaments in *M. L. N.* or *elſewhere*, not by him formerly *ſettled*, for the Payment of his Debts; and after Debts paid, then to *J. S.* a ſecond Son, and his Heirs for ever, and died; and ſoon after the eldeſt Son died, not having barred the Remainder, without Iſſue Male, but left ſeveral Daughters; and it was held by my Lord *Chancellor*, aſſiſted with *Raymond* Ch. Juſt. *Reynolds* C. B. and Mr. J. *Price*, 1*ſt*, That the Word *elſewhere* was a ſufficient Deſcription of the Lands in *D.* tho' of greater Value than thoſe in *M. L.* and *N.* and that tho' it was of it ſelf a ſignificant and expreſſive Term; yet it was the rather ſo in this Caſe, becauſe there was no Lands or Out-skirts not particularly enumerated, to which it could be applied but to thoſe in *D.* 2*dly*, That the Words, *Meſſuages*, *Lands*, *Tenements and Hereditaments*, were ſufficient to paſs the Reverſion of the Lands in *D.* notwithſtanding the Exception or reſtrictive Words, *not formerly ſettled*. Decreed *Trin.* 1730. between *Cheſter* and *Cheſter*.

20. But if *A.* deviſes Lands to *B.* in *D. S.* and *T.* and all his Lands *elſewhere*, and he hath a Mortgage of Lands that did not lie in *D. S.* or *T.* which is of more Value than the Lands in *D. S.* and *T.* the mortgaged Lands will not paſs; for he could not be thought to mean to comprehend Lands of ſo much Value under the Word *elſewhere*, which is like an *&c.* that comes in *currente calamo*, 33 *Car.* 2. Sir *Thomas Littleton*'s Caſe, 2 *Vent.* 351. decreed; but the Reporter ſays there were other Circumſtances in the Caſe, which ſhew'd that it was not his Intention that the mortgaged Lands ſhould paſs. *Vide* 1 *Vern.* 3. *S. C.* Where it appears that there were ſome ſmall Parcels of Land not ſpecified, and of the ſame Nature of thoſe deviſed; to which the Court held the Word *elſewhere* was applicable, and not to the mortgaged Lands, which were of a different Nature and of greater Value; and that the Teſtator had charged the Lands deviſed with a Rent-charge of 80 *l. per Ann.* which he never could intend ſhould iſſue out of Lands which were every Day redeemable.

21. By a general Deviſe of all Lands, Tenements and Hereditaments, Mortgages in Fee, tho' forfeited, will not paſs, nor will they paſs by ſuch a general Deviſe, tho' the Equity of Redemption is, after the Making the Will, foreclоſed or releaſed. 2 *Vern.* 623. *per Curiam.*

22. A Man having ſettled all his Eſtate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby deviſes ſeveral pecuniary Legacies to ſeveral Perſons, and then ſays, All the Reſt and Reſidue of my Eſtate, Chattels Real and Perſonal, I give and deviſe to my Wife, whom I made ſole Executrix; and the only Queſtion was, whether by this Deviſe the Reverſion of the Jointure Lands paſſed to the Wife; and my Lord Keeper, having taken Time to conſider of it, delivered his Opinion, that it did not, becauſe the precedent and ſubſequent Words explain his Intent, to carry only his Perſonal Eſtate; for in the firſt Part of his Will, having given only

Legacies

Legacies, and no Land whatſoever, the Words all the Reſt and Reſidue of his Eſtate are relative, and muſt be intended Eſtate of the ſame Nature with that he had before deviſed, which was only Perſonal; for having before given no Real Eſtate, there could be no Reſt or Reſidue of that out of which he had given away none; then the Words, *Chattels Real and Perſonal*, explain the Word *Eſtate*, and ſhew what Sort of Eſtate he meant; and make the Deviſe, as if he had ſaid, All the Reſt of my Eſtate, whether Chattels Real or Perſonal, *&c.* and ſo confine and reſtrain the extended Senſe of the Word *Eſtate*. Decreed *Hill.* 1712. between *Markant* and *Twiſden*.

### 3dly, By Uncertainty in the Deſcription of the Perſon to take.

1. If *A.* deviſes Lands to the eldeſt Son of *J. S.* by the Name of *William*, when in Truth his Name was *Andrew*, yet the Deviſe ſhall be (*a*) good. *Nel. Chan. Rep.* 403.

(*a*) A Deviſe to the eldeſt Son of *J. S.* is good, or to his ſecond or youngeſt; ſo is a Deviſe to the Wife of *J. S.* or though ſhe be called *Em* for *Emlyn*, and to *Robent Earl* of, *&c.* though his Name was *Henry*. *Co. Lit.* 3. A Deviſe to the Stock, Family, or Houſe, is good; and ſhall be intended of the Heir. *Hob.* 33.

2. If a Man has two Sons named *I.* and deviſes to his Son *I.* all his Lands, this is a void Deviſe for the Uncertainty, unleſs it can be proved that the Teſtator meant one of them in particular, by the elder Son's being beyond Sea, probably dead, *&c.* for theſe Circumſtances clear up the Intent of the Teſtator; and ſuch Averment is admitted, becauſe it is conſiſtent with the Will; and the Conſtruction and Judgment thereon muſt be genuine, becauſe taken from the Words of the Will. 5 *Co.* 68. *b.*

3. If a Man hath Iſſue two Sons and two Daughters, and deviſes his Land to his Wife for Life, and that after her Death the ſame ſhall remain to his Iſſue; this is a void Deviſe as to the Remainder; for having ſeveral Children, it is uncertain what Iſſue is intended. Between (*b*) *Taylor* and *Sayer*, *Cro. Eliz.* 742.

(*b*) *Vid. Raym.* 83. *S. C.* cited, and denied to be Law, and 3 *Lev.* 433. *cont'*, and 6 *Co.* 17.

4. If a Man has Iſſue eight Daughters by three ſeveral Venters, and one Son, and deviſes his Land to his youngeſt Daughter, the Remainder to his Son in Tail, the Remainder to his two Daughters by the middle Venter for Life, the Remainder *Proximo de Sanguine* of the Deviſor, and dies; and after the eldeſt Daughter has Iſſue, and dies; and after the Son, and all the other Daughters, except the two Daughters by the middle Venter, to whom it was given for Life, die without Iſſue, the Iſſue of the eldeſt Daughter ſhall have it. *Palm.* 303. *vide Stile* 240.

5. If a Man deviſes all his Lands to one of his Couſin *Nic. Amherſt*'s Daughters, that ſhall marry a *Norton* within fifteen Years, and dies; and *Nic. Amherſt* having three Daughters, one of them marries a *Norton* within the fifteen Years; this is a good Deviſe to her, notwithſtanding the Uncertainty; and the Law ſupplies the Words, who ſhall firſt marry, *&c.* *Mich.* 15 *Car.* 2. between *Bate* and *Amherſt*, *Raym.* 82. adjudged.

6. If a Man deviſes Lands to *J. S.* in Truſt for *A.* and the Heirs of his Body, Remainder to *B.* for Life; and further wills, that if *A.* die without Iſſue, and *B.* be then deceaſed, then, and not otherwiſe,

he gives the Lands to *J. N.* and his Heirs; though *A.* dies without Iſſue, and *B.* ſurvives; yet after the Death of *B. J. N.* ſhall take; for the Words, if *B.* be then deceaſed, expreſs the Teſtator's Meaning, that *B.* ſhould be ſure to have it for Life; and alſo ſhew when *J. N.* ſhould have it in Poſſeſſion. 2 *Vent.* 363.

7. *A.* deviſes Land to Truſtees in Fee, in Truſt to pay Debts and Legacies; and after thoſe Debts paid, then to ſell; and if any of the Teſtator's Name would buy it, ſuch Perſon to have it for 200 *l.* leſs than the Value; one of the Teſtator's Name brings a Bill for this Benefit of Pre-emption, but delays bringing of it till twenty-five Years after the Teſtator's Death; and the Bill was diſmiſſed *per* Lord *Chancellor*; for if two of the Teſtator's Name ſhould claim the Benefit of the Deviſe, who muſt have it? *Hill.* 1685. between *Huckſtep* and *Mathews*, 1 *Vern.* 362.

8. *A.* deviſed Lands to Truſtees in Truſt for his Daughter for Life, Remainder to the ſecond Son of her Body to be begotten in Tale Male, and ſo to every younger Son; and in Default of ſuch Iſſue Male, to her eldeſt Daughter, and to the firſt Son of her Body, taking upon him the Name and Arms of the Teſtator; and adds further, that he did not by Will deviſe the Eſtate to the eldeſt Son, becauſe that he expected that his Daughter would marry ſo prudently, as that the eldeſt Son would be provided for; the Daughter married, and had Iſſue a Son, who died in twelve Months after his Birth; ſhe afterwards had another Son born, after the Death of the Firſt; this ſecond muſt take, according to the Words of the Will, though contrary to the Intention of the Teſtator. *Trin.* 1710. between *Trafford* and *Aſhton*, 2 *Vern.* 660. decreed.

9. If *A. B.* and *C.* being Aliens and Brothers, *A.* has Iſſue a Son, and *B.* and *C.* are naturalized, and *B.* purchaſes Lands, and deviſes them to the Heir of his Brother *A.* and his Heirs; and *B.* dies, living *A.* and his Son, the Deviſe is void for the Uncertainty who is intended thereby; for *A.* being an Alien can have no Heir; or however, being living, can have none during his Life; but *per Glyn*, Ch. Juſt. if it had been found that the Son of *A.* was the reputed Heir of *A.* tho' *A.* was an Alien, yet his Son might have taken by this Deviſe. *Trin.* 1656. between *Foſter* and *Ramſey*, 2 *Sid.* 23, 51.

10. A Man had Iſſue a Son and a Daughter, the Daughter was married, and had Iſſue two Daughters; the Father deviſed, that all his Land ſhould deſcend to his Son; provided that if his Son died without Iſſue of his Body, then my Land to go to my right Heirs Male of my Name and Poſterity for ever; the Son died without Iſſue; and upon Ejectment between the Brother of the Deviſor and the Daughters, this was held a void Deviſe, becauſe neither could claim under the Deſcription of the Will; not the Brother; becauſe, tho' he was of his Name, yet he was not his (*a*) Heir; and though the Daughters were his Heirs, yet they were not of his Name, and ſo not within the

(*a*) This Reſolution is founded on a Rule laid down in the Old Books, *viz.* that he who taketh by Deſcription or Purchaſe, as Heir, muſt be Heir general or compleat Heir; for Inſtance, If Lands are deviſed to the Heirs of *J. S.* and *J. S.* is living at the Death of the Teſtator, the Deviſe is void, for *Non eſt hæres viventis*; ſo if Lands are deviſed to the right Heirs Males of *J. S.* and the Heir of *J. S.* is a Female, the Deviſe is void; or if the Deviſe were to the Heirs Females, and the right Heir had been a Male, it would be void in the ſame Manner; to which Purpoſe, *vide Moor* 860. *Co. Lit.* 24. *b.* 2 *Leon.* 70. *Dyer* 99. *Hob.* 33. 1 *Co. Archer's* Caſe; 1 *Co.* 103. *Shelley's* Caſe; but notwithſtanding theſe Authorities, this Doctrine has been ſhaken by the following more modern Reſolutions, in which it is held, that a ſpecial Heir may take by Purchaſe, and that a Deſcription

Deſcription of a Perſon by the Name of Heir, tho' not Heir general, operating with the Intention of the Teſtator, is ſufficient to aſcertain the Perſon to take.

the Words of the Will; and conſequently the Limitation void for the Uncertainty. Between *Counden* and *Clerk*, *Hob.* 29, 30.

11. If a Man deviſes Lands to *A.* and his Heirs, during the Life of *B.* in Truſt for *B.* and after the Deceaſe of *B.* to the Heirs Males of the Body of *B.* now living, *B.* having one Son then living; by this Deviſe a Remainder is immediately veſted in the Son; for the Words *Heirs Males now living*, in a Will, are a full Deſcription of the Son, who then was the Heir apparent of *B.* and known by the Deviſor (who was his Uncle and Godfather) to be ſo. *Mich.* 29 *Car.* 2. between *James* and *Richardſon*, 2 *Jones* 99. adjudged in *B. R.* but (*b*) reverſed in the Exchequer-Chamber.

(*b*) *Note*; The Judgment of Reverſal was reverſed in the Houſe of Lords. 2 *Lev.* 232. *S. C.* and *per Levinz*, this Point was tried again upon a new Ejectment, and like Judgment given as at firſt in *B. R.* which was confirmed in the Exchequer Chamber, and likewiſe in the Houſe of Lords. 1 *Vent.* 334. *S. C.* by the Name of *Burchett* and *Durdant*. 2 *Vent.* 311. *S. C. Raym.* 330. *S. C.* 3 *Keb.* 32. *S. C. Poll.* 457. *S. C.*

12. *A.* deviſed in this Manner: *I give to my eldeſt Heir Male, and his Heirs Males for ever, all my Lands in ſuch a Place; and if there be a Female, ſhe to have* 12 l. per Ann. *as long as ſhe lives*; the Teſtator had two Sons, the eldeſt of which died in his Lifetime, leaving Iſſue a Daughter; and it was adjudged that the Lands ſhould go to the ſecond Son, and not to the Daughter of the Eldeſt, tho' ſhe was Heir general. *Trin.* 3 *W.* 3. *Rot.* 1484. between *Baker* and *Hall* in *C. B.*

13. *A.* deviſes all his Lands to *B.* and *C.* and the Survivor of them, for the Term of twenty-one Years, for the Payment of his Debts and Legacies, and after Payment the Term to ceaſe; and after the End or ſooner Determination of that Eſtate, he deviſes the Premiſſes to the firſt Son of his Body, and to the Heirs Males of the Body of ſuch Son lawfully iſſuing; and for Default of ſuch Iſſue, to *B.* for ninety-nine Years, if he ſo long live, without Impeachment of Waſte, Remainder to the firſt and other Sons of *B.* and the Heirs Male of their Bodies ſucceſſively; Remainder to *C.* for ninety-nine Years, if he ſo long live, Remainder to his firſt and other Sons in Tail Male ſucceſſively; Remainder to the Heirs Males of my *Aunt* Mrs. *Eliz. Long*, Wife of *Richard Long*, Clerk, lawfully begotten, with Remainder to his own right Heirs; and by his Will gave 150 *l.* Annuity to *Dorothy Beaumount* his Siſter, the Plaintiff in Error, for Life, and 500 *l.* to her Children; and to his Aunt *Eliz. Long* 100 *l.* and to her Children 500 *l.* and dies without Iſſue; *B.* and *C.* entered by Virtue of the Deviſe for twenty-one Years; and afterwards both died without Iſſue, and *John Beamount* and *Dorothy* his Wife, entered in Right of *Dorothy*, as Heir at Law to the Teſtator; the Term for twenty-one Years being determined, and the Debts and Legacies paid, and *Thomas Long*, eldeſt Son of *Eliz.* (ſhe having, at the Time of making the ſaid Will, three Sons, *viz.* the ſaid *Thomas*, and two others) entred and brought Ejectment; and in the Exchequer Judgment was given by the Lord Chief Baron *Ward*, *Price* and *Lovell*, againſt Baron *Bury*, for the Plaintiff *Thomas Long*; but in *Trinity-Term* 1713. this Judgment was reverſed in the Exchequer-Chamber; and upon Error brought in the Houſe of Lords it was argued, that this

Reverſal ſhould be affirmed, 1*ſt*, Becauſe *Dorothy* being Heir at Law to the Teſtator, her Right, as ſuch, was to be favoured; and all Deviſes to diſinherit an Heir at Law were to be taken ſtrictly. 2*dly*, That to make this Deviſe good to *Thomas Long*, it muſt be conſtrued either a contingent Remainder, or the Words *Heirs Males* be taken as a *Deſcriptio Perſonæ*, to veſt in him as a contingent Remainder; it cannot be good for Want of a Freehold to ſupport it, all the preceding Eſtates being only for Years; beſides, if it were good as a contingent Remainder in its Creation, yet *Eliz. Long* the Mother being alive when the particular Eſtate determined, it cannot veſt, becauſe *Non eſt hæres viventis*; as a *Deſcriptio Perſonæ* it cannot veſt, for that ought to be ſuch a Deſcription as is *vice nominis*, which the Words *Heirs Males* (being a legal Term, and not accompanied with any other Words to determine the Senſe otherwiſe, as Heir apparent, or Heir now living, *&c.*) cannot amount to; and the Word *begotten* doth not determine the Senſe otherwiſe; nor does any Intent appear to confine the Deviſe to the Iſſue Male of *Eliz. Long*, much leſs to *Thomas Long* only, as the Perſon deſcribed in this Deviſe; but notwithſtanding theſe Reaſons, it was adjudged, that the Judgment ſhould ſtand, and the Judgment of Reverſal be reverſed; tho' ten of the Judges were of Opinion, that the Deviſe was void, and only the three Judges (*Lovell* being dead) before-mentioned, held it good. *Mich.* 1713. *in Domo Procerum*, between *Beamont* and *Long*.

14. *J. S.* deviſed to Truſtees in Truſt, after Debts and Legacies paid, to convey to *A.* his Couſin, and the Heirs Males of his Body; and for Want of ſuch Heirs Males, then to the Heirs Male of the Body of *B.* his Great Grandfather; and for Want of ſuch Heirs Male, to his own right Heirs for ever; and gave to his Siſter 2000 *l.* to be put out at Intereſt during her Life, ſhe to receive the Intereſt, and after her Death to her Children, and died; and ſoon after *A.* died without Iſſue; and *C.* being Heir Male of *B.* the Teſtator's Grandfather, but not Heir General, there being a Daughter of an elder Brother; the Queſtion was between him and the Teſtator's Siſter and Heir at Law, who had the 2000*l.* deviſed to her, whether the Deviſe was void, or not; and my Lord Chancellor held the Deviſe good, and that C. ſhould take as a Perſon ſufficiently deſcribed and intended by the Teſtator. Decreed *Mich.* 1716. between *Newcomen* and *Barkham*, 2 *Vern.* 729. and this Matter well debated.

### 4thly, By the Deviſee of Lands dying in the Life-time of the Deviſor.

1. If a Man deviſes Lands to *A.* and his Heirs, and *A.* dies in the Life-time of the Deviſor, *B.* the Heir of *A.* ſhall take nothing by the Will, for the Heirs of *A.* were not named as immediate Takers, but only to expreſs the Quantity of the Eſtate that *A.* ſhould take. *Trin.* 10 *Eliz.* between *Bret* and *Rigden*, *Plow. Com.* 345. Adjudged *per totam Curiam*, *præter Walſh*, tho' after the Death of *A.* the Deviſor ſaid to *B.* that he ſhould be his Heir, and ſhould have all the Lands which *A.* ſhould have had, if he had out-lived the Deviſor. *Vide* 2 *Lev.* 243. *And what amounts to a new Publication*, Title *Will*.

2. So if a Man deviſes Lands to *A.* his ſecond Son, and to the Heirs of his Body; and after his Death without Iſſue, then to *B.* his third Son in Tail, *&c.* if *A.* hath Iſſue, and dies in the Life of the Deviſor,

for, and then the Deviſor dies, *B.* ſhall have the Lands preſently; for the Deviſe to *A.* being void, it is as if it had never been made. *Hill.* 36 *Eliz.* between *Fuller* and *Fuller*, *Cro. Eliz.* 422, 423. But if the Deviſe had been to the Deviſor's eldeſt Son in Tail, Remainder to the ſecond Son, and the eldeſt Son had died in the Life-time of the Deviſor, leaving Iſſue, *Q.*

3. If a Man deviſes to *A.* and his Heirs, to the Uſe of *C.* and his Heirs, and *C.* dies in the Life-time of the Deviſor, his Heir can take nothing; but the Deviſe will be to the Uſe of the Deviſor and his Heirs. *Hortop*'s Caſe, 1 *Leon.* 253. *Cro. Eliz.* 243.

4. But if there be a Deviſe to *A.* for Life, Remainder to *B.* in Fee; tho' *A.* dies in the Life of the Deviſor, *B.* ſhall take, or if *A.* refuſes he ſhall take. *Plow.* 344. *Cro. Eliz.* 423. 1 *Co.* 101. *a.*

5. If a Man deviſes his Lands to his Wife for Life, and after to his four Daughters and Heirs, equally to be divided between them, Share and Share alike, to hold to them and their Heirs for ever; and one of the Daughters dies, having Iſſue a Son, and then the Deviſor dies; the Will is void for a fourth Part. *Hill.* 1656. between *Pachman* and *Cole*, 2 *Sid.* 53, 78. adjudged.

6. So if *A.* has Iſſue two Daughters, *B.* and *C.* and he deviſes ſome Tithes and Money to *B.* and gives Legacies to her Children, but declares, that ſhe having married without his Conſent, ſhe ſhould have no Part of his Real Eſtate, and deviſes his Real Eſtate to *C.* in Tail, Remainder to *B.* for Life, and to her firſt, *&c.* and *C.* marries in the Life-time of the Teſtator, leaving Iſſue; tho' afterwards *A.* makes a Codicil to his Will, and deviſes ſome particular Legacies out of his Perſonal Eſtate; yet as that does not amount to a Republication of his Will, *B.* muſt have the Lands immediately after the Death of the Deviſor, tho' contrary to the Intention of the Deviſor; the Authorities be ſo. *Per Lord Chancellor*, *Mich.* 1716. between *Hutton* and *Simpſon*, 2 *Vern.* 722.

7. If a Man deviſes Lands to *A.* and *B.* and their Heirs; and *A.* dies in the Life of the Deviſor, *B.* ſhall take the whole Land. *Mich.* 16 *Car.* 2. between *Davis* and *Kemp*, *Carter* 4, 5.



## CAP. XXVII.

# CAP. XXVII.

# Dower and Jointure.

(A) Of what Eſtate of the Husband's, with Reſpect to the Nature and Quality thereof, ſhall a Woman be endowed.

(B) What ſhall be a Satisfaction or good Bar of Dower, and how far a Dowreſs ſhall be favoured in Equity.

(C) Of Jointures, and in what Caſes a Jointreſs ſhall be more favoured or reſtrained in Equity than at Law.

## (A) Of what Eſtate of the Husband's, with Reſpect to the Nature and Quality thereof, ſhall a Woman be endowed.

1. IF *A.* in Conſideration of 100 *l.* by Bargain and Sale inrolled, conveys to *B.* and his Heirs, to the Intent that *B.* ſhall redemiſe to *A.* for Life, with a Condition, that if *A.* paid the 100 *l.* at the End of twenty Years, the Bargain and Sale ſhould be void; and *B.* redemiſes accordingly, and dies, his Wife ſhall be endowed; for tho' *B.* redemiſed upon the former Agreement, yet *A.* takes it ſubject to the Title of Dower; and it was his Folly, that he did not join another with the Bargainee, as is the antient Courſe in Mortgages. *Paſch. 6 Car.* 1. between *Naſh* and *Preſton*, *Cro. Car.* 190. agreed *in Cancellaria*, by *Jones* and *Croke*; and upon a Conference with the other Juſtices certified accordingly. *Show. P. C.* 72. *S. C.* cited.

2. If a Husband, before Marriage, conveys his Eſtate to Truſtees and their Heirs, in ſuch Manner as to put the legal Eſtate out of him, tho' the Truſt be limited to him and his Heirs; yet the Wife ſhall not be endowed of this (*a*) Truſt-Eſtate. *Paſch.* 1712. between *Bottomley* and Lord *Fairfax*, agreed clearly, and admitted *per Curiam in Cancellaria*, 1 *Chan. Rep.* 254. *S. P.*

(*a*) Of a Uſe (*not executed*) a Woman ſhall not be endowed, neither ſhall the Husband be Tenant by the *Courteſy*, *vid. Perk.* 349. 1 *Co.* 123. 4 *Co. Vernon's* Caſe, *Dr.* and *Stud. lib.* 2. *cap.* 22. *Dyer* 11. *Pl.* 47. But as to the Husband's being Tenant by the *Courteſy*, *vid.* 2 *Vern.* 585, 681. and *Q.* if there be any Difference.

3. But if a Father purchaſes Lands in his eldeſt Son's Name, and the Son is put into Poſſeſſion, who afterwards falls ſick, and in his Sickneſs the Father gets him to execute a Deed, declaring his Name was made Uſe of only in Truſt for him; and the Son recovers and continues in Poſſeſſion, and marries; after his Death, his Wife ſhall be endowed notwithſtanding this Declaration of the Truſt; and tho' the Father had got a Conveyance of the legal Eſtate from the younger Son; for *per* Lord *Chancellor*, this is a ſecret and fraudulent Deed of Truſt, to deceive Creditors and Purchaſers, and therefore reverſed the Maſter of the *Rolls*'s Decree, who had decreed it for the Father. *Paſch.* 1702. between *Bateman* and *Bateman*, 2 *Vern.* 436.

4. If a Man deviſes Lands to his Executors for Payment of Debts, and after Debts paid, to his Son in Tail; and the Son marries, and dies before Debts paid, the Eſtate of the Executors is only a Chattel Intereſt, and will not hinder the Son's Wife of Dower; but the Wife's Dower cannot commence in Poſſeſſion, nor Damages be recovered for detaining it, but from the Time of the Debts being paid. 2 *Vern.* 404. *per Curiam.*

5. If the Lands of *J. S.* are ſequeſtred for a Perſonal Duty, and he marries and dies, tho' the Lands were ſequeſtred before Marriage, yet the Wife's Right of Dower will attach them; for this Sequeſtration ſhall not ſo far bind or cover them, as to hinder the Wife of her Dower. 1 *Vern.* 118. ruled on Demurrer *per* Lord *Keeper North.*

## (B) What ſhall be a Satisfaction, or good Bar of Dower, and how far a Dowreſs ſhall be favoured in Equity.

1. IF a Man deviſes certain Lands, Money, Goods, *&c.* in Lieu and Satisfaction of Dower, the Wife cannot have both; but ſhe may waive the Deviſe and (*b*) claim her Dower. 2 *Chanc. Ca.* 24. 1 *Chanc. Ca.* 181. 1 *Vent.* 340. *S. P.*

a general provision for a wife is not a bar of Dower, unleſs expreſs'd to be ſo. Tinney v. Tinney 3 Atk. 46.

(*b*) But if a Man deviſes Lands to his Wife, during Widowhood, without expreſſing any Conſideration, the Wife ſhall have both. 1*ſt*, Becauſe a Will imports a Conſideration in itſelf, and cannot be averred to be in Bar of Dower, without it be ſo expreſſed. 2*dly*, Dower cannot be of leſs Eſtate than for Life of the Wife. 3*dly*, A Right to Dower cannot be barred by collateral Recompence. 4 *Co.* 1, 2. *Vernon*'s Caſe, *Co. Lit.* 36. *Moor*, *Pl.* 103. But if ſhe makes her Election to take under the Will, ſhe cannot afterwards claim her Dower. *Cro. Eliz.* 128. 3 *Leon.* 272. 3 *Co.* 27. *Dyer* 220.

2. *J. S.* deviſed Legacies to his Wife out of his Perſonal Eſtate, and deviſed to her Part of his Real Eſtate, during her Widowhood, and deviſed the Reſidue of his Eſtate to Truſtees for twenty-one Years, for Payment of Debts and Legacies; and the Remainder of the whole Eſtate he deviſed to the Plaintiff, (who was his Godſon, and of his Name, but a remote Relation) for Life, and to his firſt and other Sons in Tail; and my Lord Chancellor *Somers* decreed, that though it was not declared in the Will to be in Lieu and Satisfaction of Dower; yet as it may be plainly collected to be ſo intended (he having made Diſpoſition of his whole Eſtate) and as a collateral Satisfaction may be a good Bar to Dower in Equity, tho' not at Law; that ſhe muſt either take her Dower and waive the Deviſe, or accept the Deviſe, and waive the Dower. *Mich.* 1699, between

*Lawrence* and *Lawrence*, 2 *Vern.* 365. But this Decree was reverſed by *Wright* Lord *Keeper*, *Mich.* 1702. which Decree of Reverſal was affirmed in the Houſe of Lords, with 30 *l.* Coſts, 17 *May*, 1717. v. 2 Atkins 427.

3. The Lady *Radnor*'s Husband was ſeiſed in Tail of the Lands in Queſtion; but there was a Term for ninety-nine Years, prior to his Eſtate (which was created for Performance of ſeveral Truſts in the *Earl* of *Warwick*'s Will, which were all performed, and after to attend the Inheritance); he levied a Fine and ſuffered a Recovery, and ſold the Eſtate to *J. S.* who had Notice of the Marriage; but his Wife not joining, ſhe, after his Death, recovered Dower, with a *Ceſſat Executio*, during the Term, and brought her Bill to have this Term removed, and to have the Benefit of her Judgment, and Recovery at Law; but the Court held, that this being againſt a Purchaſer, Equity ought not to give her any Relief, and therefore diſmiſſed the Bill. Between the Lady *Radnor* and *Vandebendy*, 1 *Vern.* 356. 2 *Chan. Ca.* 172. *S. C.* which Decree of Diſmiſſion was affirmed in the Houſe of Lords. *Show. P. C.* 69, 70.

4. A Term was raiſed in *Black-acre*, in Truſt, to indemnify *A.* againſt Incumbrances that might affect *White-acre*, which he had purchaſed of *B.* the Defendant; and the Widow of the Son and Heir of *B.* brought a Writ of Dower of *Black-acre* againſt the Plaintiff, who was an Infant, and his Guardian had let her take Judgment at Law, without ſetting up the Term, or taking any Notice of it; and the Infant brought his Bill to be relieved againſt the Judgment; and the Court held, that this Caſe was the ſame with Lady *Radnor*'s; the Term being created to indemnify a Purchaſer, muſt continue ſo, and ſubject to that, muſt be in Truſt for the Heir; and there is no Difference where the Widow is Plaintiff or Defendant; for it is the Want of Equity excludes her from Relief. *Hill.* 1700. between *Wray* and *Williams*, 2 *Vern.* 378. *S. C.* but no Reſolution.

5. But where a Widow brought her Bill to be relieved againſt a Term for Years, aſſigned in Truſt, to attend the Inheritance, and which had been ſet up by the Heir at Law, only in Bar of her Title; and the Maſter of the *Rolls* decreed for the Widow, and that the Term ſhould not (*c*) ſtand in her Way; tho' it was objected, that it was the ſame with a Purchaſer, who had Notice. *Mich.* 1705. between *Dudley* and *Dudley*, *S. P.* Decreed *Paſch.* 1710. between *Higford* and *Higford*.

(*c*) That Tenant by Courteſy ſhall have the Aid of Equity in removing a Truſt, *vid.* 2 *Vern.* 324, 536, 585, 681.

6. A Dowreſs may redeem a Mortgage, paying her Proportion of the Mortgage-money; and as to the Reſt, ſhe may hold over till ſhe is ſatisfied. Decreed *Hill.* 1700. between *Palmer* and *Danby*.

7. If the Wife joins in a Mortgage, and levies a Fine, with an Intent to bar her Dower, and in Conſideration thereof the Husband agrees that ſhe ſhall have the Equity of Redemption in Lieu of her Dower; and he afterwards mortgages the ſame Eſtate twice more, tho' this Agreement be fraudulent againſt the ſubſequent Mortgagees, ſo as to intitle the Wife to the whole Equity of Redemption; yet ſhe ſhall have her Dower if ſhe ſurvives her Husband, and ſhall not be put to her Writ of Dower; becauſe the Eſtate may be ſo conveyed away by ſome of the Mortgagees, that poſſibly ſhe may not know againſt whom to bring her Writ of Dower. *Hill.* 1684. between *Dolin* and *Coltman*, 1 *Vern.* 294.

8. If

8. If *J. S.* apprehenſive of a Charge of High Treaſon, makes a Conveyance of his Lands to his Son, and afterwards marries a ſecond Wife, a Court of Equity will order that ſuch Conveyance be not made Uſe of to hinder ſuch ſecond Wife of her Dower. 3 *Chanc. Rep.* 94.

9. If there be a fraudulent and partial Aſſignment of Dower by the Sheriff, Equity will relieve againſt it. *Hill.* 1683. between *Hoby* and *Hoby*, 1 *Vern.* 218, 219. 2 *Chanc. Ca.* 160. *S. C.*

## (C) Of Jointures, and in what Caſes a Jointreſs ſhall be more favoured or reſtrained in Equity than at Law.

1. A Man, upon his Marriage, made a Settlement, whereby he was Tenant for Life, then to his Wife in ſpecial Tail, of Lands of 400 *l. per Ann.* Value, with Remainder to the right Heirs of the Husband; the Husband and Wife joined in Barring this Settlement, and a new Settlement was made in this Manner, *viz.* to *J. S.* and his Heirs, in Truſt as to Lands of 150 *l. per Ann.* for the Wife, and the Heirs of her Body; and for Want of ſuch Iſſue, in Truſt for the Husband and his Heirs; the Husband died without Iſſue; and the Wife ſuffered a Recovery, and deviſed the Lands for the Payment of her Debts, and died without Iſſue; on a Bill brought by the Heir of the Husband againſt the Defendants Creditors, of the Wife the Queſtion was, whether this was ſuch a Jointure made on the Wife, ſo as to make the Recovery a Forfeiture within the Statute 11 *H.* 7. For the Defendants it was objected, that a Court of Equity ought not to give any Aſſiſtance, becauſe the Statute makes the Recovery a Forfeiture of her Eſtate, and gives a Remedy by Way of Entry; and in this Caſe ſhe has only a Truſt, and no Eſtate to forfeit; it was likewiſe urged, that this Caſe was out of the Words and Meaning of the Statute; for the Limitation here is to the Wife in general Tail; and on Failure of Iſſue of that Marriage, her Iſſue by any other Husband would have had the Land, and might, without Doubt, have ſuffered a Recovery, and barred the Remainder; and the Statute only intended to provide for the Iſſue of the Husband, whoſe the Lands were: It was further urged, that theſe Lands could not be ſaid the Husband's; for the Wife, by parting with her former Settlement, which was 400 *l. per Ann.* for this of 150 *l. per Ann.* was a Purchaſer of thoſe Lands; and if the Wife, in Conſideration of this Settlement, had ſold Lands of Inheritance of her own, it would not have been within the Statute. On the other Side it was ſaid, that this was to aid a Forfeiture; but as the Statute makes the Suffering a Recovery a Forfeiture, and gives an Entry to the Perſon that has the next Eſtate, ſo in another Place it makes all Recoveries ſuffered by a Jointreſs void; and upon that Clauſe it is proper to come into Equity, to have an Execution of the Truſt; and this Caſe is within the Words of the Statute, for the Statute ſays, any Eſtate limited to the Wife, or to her Uſe; and this Statute was before the Statute *H.* 8. of Uſes, at which Time a Uſe was the ſame Thing that a Truſt is now; next, the Statute ſays, limited for Life, or in Tail; now a general Tail is as much an Intail as a ſpecial One, and as much within the

Words of the Statute, and the Statute intended to provide for the Remainder-man as well as the Iſſue. The Objection of her being a Purchaſer, is quite to take away the Statute, for ſo is every Jointreſs; and if ſhe had kept her former Jointure, that had been under the ſame Reſtrictions; and of the ſame Opinion was my Lord Keeper, and decreed accordingly. *Trin.* 1700. between *Symſon* and *Turner.*

2. On a Motion to ſtay a Jointreſs, Tenant in Tail after Poſſibility, *&c.* from committing Waſte; the Court held, that ſhe being a Jointreſs within the 11 *H.* 7. ought to be reſtrained, being Part of the Inheritance, which by the Statute ſhe is reſtrained from aliening, and therefore granted an Injunction againſt wilful Waſte. *Hill.* 1701. between *Cook* and *Winford.*

3. If *A.* charges Land in *D.* with a Portion for a Daughter by a firſt Venter, and then marries, and ſettles Part of thoſe Lands as a Jointure on a ſecond Wife, who has no Notice of the Charge; and *A.* believing that the Portion would take Place of the Jointure, by Will gives other Lands to the Wife in Lieu thereof; and the Wife, by Combination with the Heir, refuſes to accept of the Deviſe; the Daughter ſhall hold the other Lands which deſcended to the Heir, till ſatisfied her Portion. *Hill.* 1683. between *Reeve* and *Reeve,* 1 *Vern.* 219.

4. If *A.* in Conſideration of a Marriage Portion, articles to ſettle a Jointure, and dies before the Portion paid, or Settlement made; and the Wife takes out Adminiſtration to him, and ſo becomes intitled to the Money, and then brings a Bill againſt the Heir of the Huſband, to have the Jointure ſettled, ſhe ſhall have no Relief, for ſhe is not intitled to the Jointure and Money too; but the Reporter adds a *Quære*; for ſhe is intitled to theſe two Demands in diſtinct Capacities, and Debts may hereafter appear to exhauſt the Aſſets; and in Caſe the Husband had actually received the Portion, and it had been in his Poſſeſſion, ſhe would have had it as his Adminiſtratrix. *Trin.* 1687. between *Meredeth* and *Jones,* 1 *Vern.* 463.

5. But if *J. S.* before Marriage, articles to ſettle a Jointure on his intended Wife, and the Marriage is conſummated; and the Husband dies before any Settlement made, an Execution of the Articles will be decreed in Equity. 2 *Vent.* 343.

6. If *J. S.* gives a voluntary Bond after Marriage, to make a Jointure to his Wife, and he makes a Jointure accordingly, and the Wife gives up the Bond, and the Jointure is evicted, the Jointure ſhall be made good out of the Perſonal Eſtate, there being no Creditors; for the Delivery up of the Bond by a Feme Covert could no Way bind her. *Hill.* 1686. between *Beard* and *Nuthall,* 1 *Vern.* 427.

7. If a Man covenants to ſettle Lands of ſuch a Value as a Jointure, and this Covenant is omitted in the Settlement, yet it ſubſiſts in Equity; but the Value of the Lands is not to be eſtimated according to the preſent Value, but as they were at the Time of the Jointure ſettled, unleſs the Covenant be ſo. *Hill.* 1683. between *Speake* and *Speake,* 1 *Vern.* 217, 218.

8. If there be a Jointreſs, and a Covenant that her Jointure ſhall be of ſuch a yearly Value, and it falls ſhort; though her Eſtate be not without Impeachment of Waſte, yet ſhe may commit Waſte, ſo far

far as to make up the Defect of the Jointure, and Equity will not prohibit. *Mich.* 1698. between *Carew* and *Carew*, at the Rolls.

9. *J. S.* made a Settlement on his eldeſt Son for Life, with Remainder to his firſt and other Sons in Tail, Remainder over, with Power for his Son to appoint any of the Lands not exceeding 100 *l. per Ann.* to any Wife he ſhould afterwards marry, for a Jointure, (the Father being under an Apprehenſion that he was then married to a Woman which the Father diſliked, and had no Intention his Son ſhould provide for); the Father died, and the Son married that Woman (tho' there was ſtrong preſumptive Proof that he was married to her before) and after Marriage appointed certain Lands to Truſtees, in Truſt for her, for a Jointure, and covenants, that if they were not of 100 *l. per Ann.* Value, that upon Requeſt made to him, any Time during his Life, he would make them up ſo much out of other Lands in his Power; he lived ſeveral Years, and no Complaint was made, that the Lands were not of that Value, nor Requeſt to make it up, and died without Iſſue. On a Bill brought by the Widow to have the Jointure made up 100 *l.* my Lord Keeper ſaid, that a Proviſion for a Wife or Children was not to be conſidered as a voluntary Covenant, and therefore decreed the Deficiency to be made up, notwithſtanding the Circumſtances of the Caſe, and her Neglect in not requeſting it during Coverture, for the Laches of a Feme cannot be imputed to her. *Hill.* 1701. between *Fothergill* and *Fothergill.*

10. If *A.* in the Life-time of his firſt Wife, ſettles Lands to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail, and the Wife dies without Iſſue; and *A.* on his ſecond Marriage, in Conſideration of a Portion paid, agrees to ſettle Part of the Lands as a Jointure on his ſecond Wife, the Court will ſet aſide the firſt Settlement, as fraudulent againſt the Jointreſs, who is a Purchaſer for valuable Conſideration. 1 *Chan. Ca.* 100.

11. If a Feme Covert joins with her Husband in a Fine and Mortgage of her Jointure Lands, there reſults a Truſt for her when the Mortgage is paid, to have the Lands again. 2 *Chan. Ca.* 161.

12. So if a Feme Covert joins with her Husband in a Mortgage of her Jointure Lands, ſhe may redeem; and if ſhe pays more than the third Part of the Principal Money, her Executor ſhall hold the Lands till re-imburſed. 2 *Chan. Ca.*

13. So if a Jointure is made of Lands which are mortgaged, the Wife may redeem, and her Executor ſhall hold over till repaid with Intereſt. 1 *Chan. Ca.* 271. 2 *Vent.* 343. *S. P.* decreed.

14. If the Heir brings a Bill againſt a Jointreſs to diſcover Deeds and Writings, he is not intitled to ſee them, unleſs he confirms the Wife's Jointure, though the Jointure was made after Marriage. 1 *Vern.* 479.

15. So if a Bill is preferred againſt a Jointreſs to anſwer, whether her Husband had any other Title than as Aſſignee of a Mortgage, and ſhe denies that ſhe had any Notice of this Mortgage, and ſays, that her Husband told her that he was in by Deſcent; ſhe ſhall not be obliged to anſwer, whether her Husband had any other Title than as Aſſignee of the Mortgage. *Mich.* 1715. between *Stephens* and *Guale*, 2 *Vern.* 701.

# CAP. XXVIII.

## Evidence, Witneſſes and Proof.

(A) Of the Sufficiency and Diſability of a Witneſs.

(B) What will be admitted as Evidence, and will amount to ſufficient Proof.

(C) Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.

(D) Of examining Witneſſes, exhibiting Interrogatories, publiſhing and ſuppreſſing their Depoſitions.

(E) Of examining Witneſſes de bene eſſe, and eſtabliſhing their Teſtimony in perpetuam rei memoriam.

### (A) Of the Sufficiency and Diſability of a Witneſs.

1. A. Exhibited a Bill to be relieved touching an Annuity charged on the Eſtate of the Defendant's Wife, and examined his Brother as a Witneſs for him, who had a like Annuity charged on the Eſtate by the ſame Deed; and though it was urged, that he had Satisfaction made to him in Lieu of it, and had releaſed his Right; yet it not appearing by any Proof in the Cauſe, the Court put off the Hearing, and gave the Plaintiff Liberty to examine Witneſſes, to prove that the Brother had releaſed the Annuity before he was examined as a Witneſs in the Cauſe. *Trin.* 1700. between *Culpeper* and *Fairfax*, 2 *Vern.* 375.

2. A Witneſs was examined whilſt ſhe was intereſted, before the Hearing; and the Cauſe being heard, and decreed to an Account, ſhe was re-examined after the Hearing, before the *Maſter* on the Account, having firſt releaſed her Intereſt; and it was objected, that ſhe ought not to be read, for having been examined whilſt intereſted, and her

her Depoſitions publiſhed, ſhe was thereby ingaged, and almoſt under a Neceſſity of Standing to what ſhe had before ſworn, and could not be free to retract or contradict it; but the Lord *Keeper* over-ruled the Objection. *Mich.* 1704. between *Callow* and *Mime*, 2 *Vern.* 472.

3. If a Bankrupt has aſſigned and releaſed all his Eſtate and Right to the Aſſignees, he may be examined as a Witneſs for them. 2 *Vern.* 637. *Per Curiam*, a Legatee of a ſmall Legacy, as 5 *s.* to a private Perſon, or 5 *l.* to a Nobleman, may be a Witneſs for the Will. 1 *Vern.* 254.

4. Upon an Appeal from the Rolls, it was objected to the Evidence of one *Norris*, as a Witneſs examined in the Cauſe, and read at the Hearing at the Rolls, that ſince that Hearing, in Anſwer to a Bill exhibited againſt him, he had confeſſed, that on the Day on which he was examined as a Witneſs, he took a Bond of the Plaintiff, that if the Plaintiff recovered the Eſtate in Queſtion, he would convey Part of it to the ſaid *Norris*; and *per* Lord *Keeper*, *Holt* Ch. Juſt. and *Powel* Juſt. this Anſwer muſt be read to take off his Evidence as a Party intereſted. *Mich.* 1704. between *Needham* and *Smith*, 2 *Vern.* 463, 464. And *per* Lord *Keeper*, tho' a Witneſs is examined an Hour together at Law, if in any Part of his Evidence it appears that he was a Party intereſted, the Court will direct the Jury, that he is no Witneſs, nor any Regard to be had to his Evidence.

5. Several Perſons were examined as Witneſſes no Ways concerned in Intereſt, and the Cauſe heard, and Iſſues directed to be tried, but the Trials were not carried on, and the Cauſe ſlept many Years, and after abated; and then thoſe Perſons who had been examined as Witneſſes, became Heirs at Law, and thereby intereſted in the Matter; the Cauſe was revived and reheard, and the ſame Iſſues directed to be tried; and the Perſons who had been ſo examined (being now Plaintiffs) prayed to have an Order, that their Depoſitions taken when they were diſintereſted, might be read as Evidence at Law for themſelves; and my Lord *Keeper* ordered it accordingly; and likened it to the Caſe, where one is the only, or only ſurviving Witneſs to a Deed, becomes after the Party intereſted, his Hand may be proved at Law; ſo if a Witneſs to a Deed becomes blind. Then the Cauſe proceeded to Trial at Bar in *C. B.* where the whole Court held theſe Depoſitions could not be read without Conſent, the Parties being living; but the Defendant conſented, and had a Verdict for him; and the Plaintiff obtained a new Trial, and then would have had the ſame Order; but my Lord *Keeper* ſaid, ſince the Judges had reſolved otherwiſe, he could not take upon him to make that Evidence which was not, and therefore only ordered they ſhould be read in Evidence, as by Law they might. *Trin.* 1702. between *Holcroft* and *Smith*.

6. But where one who was examined as a Witneſs when diſintereſted, and afterwards became intitled to the Eſtate in Queſtion, and the Court of Chancery allowed his Depoſitions to be read, *vide* 2 *Vern.* 699. and there ſaid, that the Reaſon why the Depoſition of a Witneſs, taken whilſt unconcerned in Intereſt, could not be made Uſe of at Law, was founded on that Rule of Law, *viz.* that where the Witneſs is living, and might be produced at the Trial, the Depoſition of ſuch Witneſs ſhall not be read.

7. A Co-Plaintiff, tho' but a Truſtee, cannot be examined as a Witneſs for the other Plaintiff. 1 *Vern.* 230. But one Defendant may be examined as a Witneſs for another. 2 *Chan. Ca.* 214. *S. P.*

8. Plaintiffs cannot examine each other as Witneſſes in the Cauſe, becauſe, if the Cauſe miſcarries, the Plaintiffs will be liably to Coſts, and therefore their Swearing is to exempt themſelves; and it is their own Choice that they are made Plaintiffs, for without their Conſent they could not; but Defendants are forced into the Cauſe; and if their being made Parties ſhould abſolutely invalidate their Teſtimony, it would be in the Power of any one who had a Mind to oppreſs another, to deprive him of his Defence, by making the moſt material Witneſſes Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witneſſes, ſaving juſt Exceptions to their Credit. *Mich.* 1715. between *Caſey* and *Beachfield*, agreed *per Curiam in Can'.*

9. A Commiſſioner may be a Witneſs, but he ought to be examined before any other Witneſs. 1 *Vern.* 369.

10. In a Suit to ſet aſide a hard Award, the Arbitrator or Umpire, who made the Award, may be examined as a Witneſs. 1 *Vern.* 157, 158.

11. A Bond of 400 *l.* Penalty was entred into; and the Queſtion was, whether it was for the Benefit of the Corporation of ——, or for the Defendant; and the Witneſſes for the Plaintiffs being all Members of the Corporation, it was objected, that they could not be read, they ſwearing for their own Benefit; which Exception was allowed; but it appearing that the Defendant had croſs-examined ſome of the Plaintiff's Witneſſes, not only to Queſtions barely whether they were of the Corporation, or not, but to other Queſtions, which tended to the Merits of the Cauſe; the Lord *Keeper* declared, that made them good Witneſſes, though they were Members of the Corporation; and upon their Evidence it was decreed for the Plaintiffs. *Mich.* 1684. between the Corporation of *Sutton Coldfield* and *Wilſon*, 1 *Vern.* 254. And *per* Lord *Keeper*, a Corporation ought to have a Town-Clerk and Under-Clerks, that are not Freemen, that they may be competent Witneſſes, upon Occaſion; and he ſaid, that he thought it very hard in the Caſe of the Water-bailage of *London*, that no one Freeman of the City, though it was not 6 *d.* Concern to him, could be admitted as a Witneſs.

12. The Suit being touching the Loſs and Miſapplication of a Sum of Money given for the Benefit of the Pariſhioners; the Queſtion was, whether any Inhabitant of the Pariſh ought to be admitted as a Witneſs; for the Plaintiff it was inſiſted, that the Intereſt was ſo minute and inconſiderable, that it could not be preſumed to influence the Witneſs, or biaſs him in his Evidence; but *per Curiam*, the Caſes where the Party was concerned in Intereſt, though never ſo ſmall, have always prevailed; and it was ſo reſolved, upon great Debate, in the Caſe of the City of *London*, concerning the Water-Bailiff. *Paſch.* 1694. between *Dodſwell* and *Nott*, 2 *Vern.* 317.

13. If an Executrix to a firſt Husband marries a Second, and a Bill is exhibited againſt them to diſcover a Truſt, and they in their Anſwers diſagree in the Matter, the Wife confeſſing what the Husband denies, and what the Plaintiff can prove only by one Witneſs, the Plaintiff can have no Relief; for one Witneſs is not ſufficient againſt

the Husband's Anſwer; and the Wife's Confeſſion will not avail, for ſhe can be no Witneſs againſt the Husband. 2 *Chan. Ca.* 39.

14. So where the Plaintiffs, who were Infants, and the Children of the Defendant's Wife by a former Husband, exhibited a Bill to have an Account of the Eſtate left them by their Father, and of the Produce thereof; and upon the Hearing it was referred to an Account, and the Defendant and his Wife were to be examined on Interrogatories, for Diſcovery of the Eſtate; the Wife being at Variance with her Huſband, and living a-part from him, on her Examination made the Eſtate of the Plaintiffs (who were her Children) as great as ſhe could; thereupon to fix a Charge upon the Husband; the Plaintiffs, upon a Petition to the Maſter of the Rolls, obtained an Order to examine the Wife as a Witneſs againſt the Husband *de bene eſſe*; and the Maſter, upon her Evidence had charged the Husband with ſeveral Sums of Money, as Intereſt and Produce of the Infants Eſtate; but upon Exceptions to the Report, the Lord *Chancellor* diſallowed her Evidence, and declared the Wife could not be a Witneſs againſt her Huſband. *Trin.* 1688. between *Cole* and *Gray*, 2 *Vern.* 79.

15. The Plaintiff was Servant to the Defendant's Wife Mrs. *Baldwin*, and had in ſeveral Services ſaved about 50*l.* the Defendant and his Wife having ſome Time lived ſeparate. The Wife paſſed for a Widow, and the Plaintiff knew nothing of her being married; Application was made to Mrs. *Baldwin* by one *Buſſey*, (who was likewiſe a Defendant) to borrow 100*l.* on a Mortgage; Mrs. *Baldwin* told him, ſhe could only let him have 50*l.* of her own Money, but that ſhe could get the other 50*l.* of a young Woman; accordingly, ſoon after, ſhe acquaints *Buſſey* that ſhe had got the 100*l.* and directed the Mortgage to be made to herſelf by the Name of *Pleahill*, that being her maiden Name, though ſhe ſometimes went by the Name of *Baldwin*, and at other Times by the Name of *Tuite*, having been the Widow of one *Tuite*; the Mortgage was made accordingly; and ſome Time after ſhe gave the Plaintiff a Bond of the Penalty of 100*l.* for Payment of 50*l.* and Intereſt, and this ſhe gave by the Name of *Tuite*: *Buſſey* made ſeveral Payments of Intereſt to Mrs. *Baldwin*, and knew nothing of her Marriage neither; afterwards Mr. *Baldwin*, having Notice of the Mortgage, gets that, and all the Writings relating to it, into his Cuſtody, and ſome Time after Mrs. *Baldwin* obtained a Sentence of Divorce from her Husband, upon Pretence of ill Uſage; and on Diſcovery of the Marriage, the Bill was brought againſt the Husband and Wife, and *Buſſey*, to charge this 50*l.* either on the Mortgage, or upon the Perſon of the Husband; the Wife put in a ſeparate Anſwer, wherein ſhe diſcloſed all the Matter as above-mentioned; *Buſſey* by his Anſwer confeſſed what is before ſet forth, and moreover, that Mrs *Baldwin* had told him lately, that the Plaintiff was the young Woman ſhe meant, and of whom ſhe had the 50*l.* The Husband, by his Anſwer, inſiſted upon his Title by Law to this Mortgage, and 100*l.* and denied, to his Knowledge, that 50*l.* or any Part of it was the Plaintiff's Money, and ſaid, he believ'd this Suit to be ſet on Foot, on Contrivance between the Plaintiff and his Wife, to get ſo much Money out of him; the Plaintiff examined, by Order of Court, *Buſſey* as a Witneſs, and his Depoſition was in Effect the ſame as his Anſwer, which in Truth was nothing more than an Account of what he had heard the Wife ſay on this Occaſion, ſo that the whole Evidence was in Effect the

Wife's; and whether that ſhould be allowed in this Caſe, was the principal Queſtion: The Court agreed clearly, that the Wife ſhall never be admitted by an Anſwer, or otherwiſe, as Evidence to charge her Husband; as where a Man marries a Widow Executrix, *&c.* her Evidence ſhall not be allowed to charge her ſecond Husband with more than ſhe can prove to have actually come to her Hands. But the Maſter of the *Rolls* ſaid, this was perfectly a new Caſe; for here ſhe tranſacted this Affair with *Buſſey* and the Plaintiff as a *Feme Sole*, and neither of them knew or had Notice of the Marriage; and the Husband himſelf, as was proved in the Cauſe, on ſome other Occaſions, had given in to the Concealment of the Marriage; and therefore the Court did allow of her Evidence, as it was ſupported by what *Buſſey* ſaid; and thought, upon the whole, the Evidence of the Wife ſufficient to prove 50*l.* Part of this Money, to be the Plaintiff's, not conſidered as a Wife, but as ſhe tranſacted and appeared throughout as a Feme Sole, and therefore decreed the Plaintiff the 50*l.* with Coſts. *Hill.* 1719. between *Rutter* and *Baldwin.*

## (B) What ſhall be admitted as Evidence, and will amount to ſufficient Proof.

1. A Bill in another Cauſe is not to be read as Evidence againſt the Plaintiff named in it, unleſs it be proved, that it was exhibited with his Privity, for any one may file a Bill in another's Name. 17 *Car.* 2. between *Wollett* and *Roberts*, 1 *Chan. Ca.* 64.

2. The Depoſitions of Witneſſes taken in a Cauſe, which was heard thirty Years before, were ordered to be made Uſe of, the ſame Matters being then under Examination as at preſent; and the Plaintiff's Title not then appearing, and the Witneſſes being ſince dead, though none of the preſent Parties were Parties to the former Suit, except the Tertenants. *Paſch.* 18 *Car.* 2. between *Terwit* and *Greſham*, 1 *Chan. Ca.* 73.

3. Where the Defendant's Counſel moved, that they might be at Liberty to read Depoſitions in this Cauſe, which were taken in a Cauſe where the Plaintiff's Father was a Party to the Suit, being in all Matters the ſame; but on the other Side it was objected, that the now Plaintiff not claiming as Heir, and his Father being only Tenant for Life, thoſe Depoſitions could not be read againſt him; and upon long Debate, the Defendant had only the common Order, for Leave to read thoſe Depoſitions at the Hearing, ſaving juſt Exceptions. *Mich.* 1686. between *Coke* and *Fountain*, 1 *Vern.* 413. And it was ſaid to be a common Caſe, that where one Legatee has brought his Bill againſt an Executor, and proved Aſſets; and afterwards another Legatee brings his Bill; that he ſhould have the Benefit of the Depoſitions in the former Suit, tho' he was not Party to it.

4. So where *J. S.* deviſed his Real Eſtate for the Payment of his Debts, and the Surplus to the Plaintiffs, and the Creditors exhibited a Bill againſt one *J. N.* and made the Plaintiffs Parties, to ſet aſide ſome Conveyances obtained by him, by Fraud from the Teſtator, and had a Decree to that Purpoſe; afterwards the Plaintiffs, who were intitled to the Surplus, exhibited a Bill likewiſe againſt *J. N.* relating to the ſaid Fraud; and it was held, that there being the ſame Queſtion in both Cauſes, and *J. N.*'s Defence being the ſame, that

that the Depoſitions in the former Cauſe ſhould be read againſt him. *Mich.* 1703. between *Nevill* and *Johnſon*, 2 *Vern.* 447. That a Man's Anſwer in the Spiritual Court, or voluntary Oath before a Juſtice of the Peace, may be read againſt him in Chancery, by Order, *vide* 1 *Vern.* 53.

5. The Defendant, on preſenting the Plaintiff to a Living, took a Bond from him to reſign, and after put it in Suit, and recovered, and levied 98 *l.* and the Plaintiff's Bill was for Relief; the Defendant did not by Anſwer pretend any Misbehaviour, yet examined to ſeveral Misbehaviours; and it was urged that theſe Depoſitions could not be read, becauſe thoſe Misbehaviours were not in Iſſue; and ſo inclined my Lord *Keeper*; but after allowed them to be read, and founded his Decree on them. *Hill.* 1702. between *Hodgſon* and *Thornton*.

6. The Defendant having obtained a Bill of Sale of Goods, and likewiſe a Note from his Brother, a little before his Death, for Payment of 300 *l.* the Plaintiff inſiſted thoſe were voluntarily given, and for a Colour only; and that underneath the Note, the Defendant had ſubſcribed an Acknowledgment, that no Debt was due to him; the Defendant by Anſwer ſwore his Debt, and denied that there was any ſuch Defeaſance or Acknowledgment; it appeared upon the Proof, that the Defendant depoſited the two Inſtruments he had ſo obtained in the Hands of *A. B.* his Siſter, and afterwards wrote to her to ſend him the two Inſtruments, by a ſpecial Meſſenger ſent for that Purpoſe, and that ſhe ſhould not let any Body ſee them; his Siſter ſent them, but ſat up all Night to take Copies of them, as ſhe declared in her Life-time (being dead before the Commencement of the Suit); and upon producing the Copies ſo taken by the ſaid *A. B.* there appeared to be ſuch Acknowledgment under-wrote, that there was no real Debt; and upon inſpecting the Inſtruments produced by the Plaintiff upon ſtamp'd Paper, it appeared that the Bottom was torn off; and my Lord Chancellor allowed the Copies to be read, being the Hand-writing of *A. B.* although not proved to be true Copies. *Hill.* 1707. between *Winne* and *Loyd*, 2 *Vern.* 603.

7. A Deed to lead the Uſes of a Fine was inrolled for ſafe Cuſtody only, and a Copy from the Inrolment being offered in Evidence, it was objected, that it was no Evidence, being inrolled for ſafe Cuſtody only; nor is the Inrolment it ſelf, without particular Circumſtances to ſupport it, as proving the original Deed was in the Defendant's Cuſtody or Power, or accidentally loſt, *&c.* and of that Opinion was the Maſter of the Rolls, who ſaid, that in Caſe of an Inrolment for ſafe Cuſtody, the Deed may be ſaid to be recorded; but where a Bargain and Sale is inrolled purſuant to the Statute, the Inrolment is a Record, ſo that a Copy of it may be read in Evidence. *Mich.* 1704. between *Combes* and *Spencer*, 2 *Vern.* 471. The Reporter adds a *Note*, that afterwards, upon a Rehearing, an Iſſue at Law was directed, whether ſuch Deed of Uſes was executed; and upon the Trial, a Copy of the Deed was allowed to be read, and a Verdict for the Deed. 2 *Vern.* 591. *S. C.*

8. The Defendant having ſuppreſſed a Marriage-Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father, and all the prior Eſtates ſpent; upon Proof made that the Settlement came to the Defendant's Hand, and that he had confeſſed it to an Anſwer to a former Bill, though he now denied it; the Maſter

of the Rolls decreed the Plaintiff ſhould hold and enjoy the Eſtate; and this Decree was confirmed by my Lord *Keeper*. 2 *Vern.* 380. *Vide* 1 *Vern.* 452. *S. P.*

9. A Bill was exhibited touching the Plaintiff's Jointure, which the Bill charged was, by parol Agreement, made on the Marriage, agreed to be 400*l. per Annum*; the Defendant pleaded, that after all Treaties and Agreements touching the Marriage-Settlement, a Jointure was actually ſettled and accepted, and the Marriage thereupon had eighteen Years before: And *per* Lord *Chancellor*, the Jointure Deed is an Evidence, that all the precedent Treaties and Agreements were reſolved into that; but ordered the Defendants to anſwer, and ſaved the Benefit of the Plea to the Hearing. 1 *Vern.* 369.

10. The Plaintiff having lent *J. S.* 600*l.* on a Mortgage, and afterwards diſcovering that the Eſtate was pre-mortgaged to the Defendant, got in an old ſatisfied Incumbrance, and brought his Bill to compel the Defendant to redeem, or be foreclоſed; and it was objected, that the Plaintiff, in this Caſe, (as between him and the Defendant, who was a Purchaſer,) ought to have proved the actual Lending and Payment of the Conſideration-money; and the producing the Deed or an Acquittance was not ſufficient; but the Court held it well enough, and that the Producing the Deed or Acquittance was ſufficient Evidence. *Mich.* 1692. between the Lord Chief Juſtice *Holt* and *Mill*, 2 *Vern.* 279. *vide* 1 *Vern.* where, by the Maſter of the *Rolls*, there are four Things favoured in Equity, *viz. Livery*, *Attornment*, Aſſent to a Legacy, and the new Publication of a Will, and in either of theſe Caſes a ſlender Evidence will ſerve the Turn.

11. Some Bailiffs, who had ſerved an Execution in Breach of an Injunction, find Money hid in the Houſe, and carry it away; and the Party, at whoſe Suit the Execution was taken out, was ordered to make Satisfaction, who complained of this Order as unjuſt, ſaying, that the Parties ſhould be admitted to purge themſelves by Oath, and that the Plaintiff ſhould not be admitted to be Judge of his own Damages; but my Lord Chancellor confirmed the Order, and ſaid, that a Man who had ſtolen, would not ſtick to forſwear it; and that therefore, *in Odium ſpoliatoris*, the Oath of the Party injured ſhould be a good Charge on him who did the Wrong. 1 *Vern.* 207, 308. *S. C.* cited.

12. If there be but one Witneſs againſt the Defendant's Anſwer, the Plaintiff cannot have a Decree, it being Oath againſt Oath. *Paſch.* 1683. between *Alam* and *Jourdon*, 1 *Vern.* 161. 3 *Chan. Ca.* 123. *S. P.*

13. The Defendant denied Notice of the Plaintiff's Title, the Plaintiff proved it by one Witneſs, which by the Uſage of this Court, is not ſufficient to ground a Decree for the Plaintiff, being Oath againſt Oath; but the Courſe has been to direct a Trial at Law; but in this Caſe my Lord *Keeper* ſaid, he did not ſee the Difference between doing it *per Plura* and *per Pauciora*; for to ſend it to Law to be tried, where the Jury will certainly find it on the Teſtimony of one Witneſs; and then Decreeing it on that Verdict, is the ſame Thing as Decreeing on one Witneſs, without trying it at all, and therefore directed it to be tried; but that the Plaintiff ſhould admit the Defendant's Anſwer to be read at the Trial, not as Evidence, for that he ſaid it could not be, nor ſhould they admit it to be true; but to be

ſworn, ſo that the Defendant might have the Benefit of his Oath at Law, as in this Court, if it would weigh any Thing with the Jury. *Paſch.* 1706. between *Ibbotſon* and *Rhodes*, *vide* 2 *Vern.* 554. *S. C.*

## (C) Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.

1. THE Earl of *Gainsborough* made his Will, and thereby deviſed ſeveral Legacies, and charged his real Eſtate with the Payment of them and his Debts, and deviſed his Eſtate ſo charged to the Defendant his Nephew, and made the Plaintiff his Wife Executrix; and the Bill was brought to have the Perſonal Eſtate diſcharged from the Debts and Legacies, ſuggeſting, that the Creditors threatned to come upon and exhauſt the Perſonal Eſtate, and that it was the Intent of the Teſtator, that ſhe ſhould have the Perſonal Eſtate clear to herſelf, and that the Directions for making the Will were ſo; but that either by the Miſtake or Contrivance of the Perſon who drew the Will, it was not ſo expreſſed; the Defendant demurs, for that no ſuch Averment could or ought to be admitted againſt the Will in Writing; but by *Rawlinſon* and *Hutchins* the Demurrer was over-ruled; and they ſaid, that though ſuch an Averment could not be (*a*) admitted, where it was to make the Party a Title, yet where it was only to rebut an Equity, as it is in this Caſe, it might; and cited the Caſe of *Crompton* and *North*, 1 *Chan. Ca.* 196. where Mrs. *Crompton* deviſed her Lands to Sir *H. North*, to be ſold for Payment of her Debts, which were very ſmall, and the Heir would have had the Surplus a Truſt for him; and the Court was of Opinion, that Sir *H. North* might be admitted to prove Mrs *Crompton*'s Intent otherwiſe; and the Caſe of *Kingſmill* and *Ogle*, 8 *May*, 17 *Car.* 2. and *Foſter* and *Munt*, and *Pring* and *Pring*, 2 *Vern.* 99. Afterwards the Cauſe coming on to be heard, on the Proofs it appeared plainly, that my *Lord*'s Intention was, that ſhe ſhould have the Perſonal Eſtate, clear of the Debts; which was decreed accordingly; and that if it were taken from her by the Creditors, ſhe ſhould come in as a Creditor on the Real Eſtate; and 27 *Feb.* this Decree was affirmed in the Houſe of Peers. Between the *Counteſs* and *Earl of Gainsborough*, 2 *Vern.* 252. *S. C.*

(*a*) The conſtant Rule of Law has been, to reject all parol Proof brought to ſupply the Words of a Will, or to explain the Intent of the Teſtator, and that nothing *dehors* ſhould be averred, is the expreſs Reſolution in Lord *Cheyney*'s Caſe, 5 *Co.* 67. and this Rule has ſince been thought neceſſary to be adhered to, not only on Account of the Statute of *Frauds* and *Perjuries*, which was made to prevent Perjury, Contrariety of Evidence, and Uncertainty; but becauſe little Regard ought to be had to the Expreſſions of the Teſtator, either before or after the Making his Will; becauſe, poſſibly thoſe Expreſſions might be uſed by him, on Purpoſe to controul or diſguiſe what he was doing, or to keep the Family quiet, or for other ſecret Motives and Inducements, which cannot after his Death be found out; but this Rule has received a Diſtinction which has greatly prevailed of late, *viz.* between Evidence offered to a Court, and Evidence offered to a Jury; for in the laſt Caſe, no parol Evidence is to be admitted, leſt the Jury might be inveigled by it; but in the firſt Caſe it can do no Hurt, being to inform the Conſcience of the Court, who cannot be biaſſed or prejudiced by it. *Vide* 2 *Vern.* 98, 337, 625.

2. So where *J. S.* deviſed all his Houſhold-Goods, as Woollen, Linen, Pewter and Braſs whatſoever, except a Trunk under the Chamber-window; and the Queſtion was, whether the parol Proof of the Perſon who drew the Will, ſhould be admitted to explain

theſe Words; and my Lord *Keeper* thought it might, notwithſtanding the Statute of *Frauds* and *Perjuries*; for it here neither adds to, nor alters the Will, but only explains which of the Meanings ſhall be taken; as in Caſe of a Deviſe to Son *John*, when the Teſtator had two of the ſame Name; and here the Word (*As*) may be a Reſtriction, or if the following be as particular Inſtances, it may not reſtrain the Word (*whatſoever*); and he thought the Words imported to carry all the Houſhold-Goods; and the Maſter of the *Rolls* being of that Opinion too, the Proof was read. *Mich.* 1705. between *Pendleton* and *Grant*, 2 *Vern.* 517. *S. C.*

3. *J. S.* having three Daughters, and ſeveral Grandchildren and Great Grandchildren, made his Will, and deviſed the Surplus of his Eſtate to be equally divided amongſt his three Daughters, and all his Grandchildren and Great Grandchildren, that ſhould be living within two Years after his Death, and died; and within two Years after his Death other Grandchildren were born; the Plaintiffs examined Witneſſes to prove *J. S.*'s Intent, that none born after his Death ſhould take; and the Queſtion was, whether they could be admitted to read this Proof; and my Lord Keeper was of Opinion, that ſuch Proof might be admitted; ſo the Witneſſes were read; but their Depoſitions were only, that *J. S.* ſaid ſo or ſo, or to that Effect, which my Lord ſaid ſignified nothing, for that makes the Witneſs the Judge; and he ought to ſet down the very Words, for the Court to judge of; but without this Proof, my Lord held, that the Words in the Will (within two Years after my Death) were to be taken reſtrictively, and extended to none born after; and decreed accordingly; which Decree was affirmed in the Houſe of Lords. *Trin.* 1700. between *Dayrell* and *Molſeworth*, 2 *Vern.* 378. *S. C.* reported on another Point.

4. The Teſtator made his Will, and his Brother Executor, and deviſed to him his Real Eſtate, and thereby willed, that his Executor, out of his Rents in Arrear, and other his Perſonal Eſtate, and out of Half a Year's Rents and Profits of his Real Eſtate, after his Death, ſhould pay his Debts and Legacies therein after-mentioned, and amongſt other Legacies deviſed 40 *l. per Ann.* to the Plaintiff, his Wife's Nephew, to maintain him at *Cambridge*, to be paid by his Brother and Executor; the Brother alledging, that he had fully adminiſtred the Perſonal Eſtate, and alſo the Half Year's Profits of the Real which incurred after the Teſtator's Death, refuſed to pay the 40 *l. per Ann.* and tho' it was admitted, that the Will had only made the Half Year's Rents and Profits of the Real Eſtate liable; yet upon the Evidence of one *J. N.* who ſwore that the Brother promiſed the Teſtator, that he would pay the Plaintiff the Annuity, it was decreed for him by the Maſter of the *Rolls*, and confirmed by my Lord *Keeper*. *Trin.* 1705. between *Oldham* and *Litchford*, 2 *Vern.* 506.

5. *A.* deviſed to *B.* Lands of 60 *l. per Annum* Value, paying 100 *l.* which he owed *J. S.* and 100 *l.* more, which he by Bond owed *J. N.* and after ſome ſmall Legacies, deviſed the Reſt of his Perſonal Eſtate to the Plaintiffs his Nieces; it happened that the 100 *l.* by Bond was not due to *J. N.* but to *S. H.* and therefore the Deviſee of Lands refuſed to pay it, inſiſting it ſhould be paid out of the Perſonal Eſtate; but the Perſon who drew the Will having ſwore that

that the Teſtator intended the Debt due to *S. H.* the Maſter of the *Rolls* decreed the Deviſee of the Lands liable; which Decree was affirmed by my Lord Chancellor, who ſaid, he ſaw no Hurt in admitting collateral Proof to make certain the Perſon or the Thing deſcribed. *Mich.* 1707. between *Hodgſon* and *Hodgſon*, 2 *Vern.* 593.

6. *A.* deviſed to his Wife ſome particular Legacies, and made her Executrix, but made no Diſpoſition of the Surplus of his Perſonal Eſtate; and the Court admitted parol Proof, to ſhew that the Teſtator intended her the Surplus, being to ouſt an Implication or Rule in Equity; and on the Evidence decreed for the Wife. 2 *Vern.* 648, 736. *S. P.* Parol Proof admitted, to ſhew that a Legacy greater than a Debt due to the Legatee was not in Satisfaction of the Debt. 2 *Vern.* 593, 594.

7. If *A.* purchaſes in the Name of *B. A.* may be admitted to prove that he paid the Purchaſe-money, and ſo make it a reſulting Truſt, or Truſt by Implication of Law for himſelf. 1 *Vern.* 366.

8. An Entry in the Steward's Book, and a parol Proof by the Foreman of the Jury, admitted as good Evidence, that a Feme Covert ſurrendered her whole Eſtate, although the Surrender upon the Roll, and the Admiſſion thereon, was but of a Moiety. *Paſch.* 1706. between *Hill* and *Wigget*, 2 *Vern.* 547.

## (D) Of examining Witneſſes, exhibiting Interrogatories, Publiſhing and Suppreſſing their Depoſitions.

1. A Maſter examined one Witneſs three Times to a Matter of Account, and the Depoſitions were ſuppreſſed. 2 *Chan. Ca.* 79.

2. If an Interrogatory is leading, that is ſufficient to ſuppreſs the Depoſition. 2 *Vern.* 472.

3. Interrogatories, and the Depoſitions of a Witneſs taken on them, had been ſuppreſſed, for that the Interrogatories were leading, and then Publication paſſed; and the Court was moved, that a new Set of Interrogatories might be drawn, and ſettled by the Maſter, for the Examination of this Witneſs, whoſe Evidence was very material, and yet muſt be wholly loſt, unleſs the Court would indulge them this Way; and though the Practice was admitted to be always againſt it; and it was urged to be of dangerous Conſequence; yet one Precedent being produced to this Purpoſe, and the Interrogatories which had been ſuppreſſed being ſuch as might be drawn by many other Counſel, without an Apprehenſion of their being leading; the Court, to let in the Party to the Benefit of his Witneſſes Teſtimony, ordered Interrogatories to be put in and ſettled by a Maſter, for his Examination over again. *Trin.* 1718. between *Spence* and *Allen.*

4. Though the Rule be, that after Publication no new Witneſs can be examined, nor a Witneſs before examined re-examined; yet on ſpecial Circumſtances ſet forth by Motion and Affidavit, the Rule may be diſpenſed with. 1 *Chan. Ca.* 228. 2 *Chan. Ca.* 75. 1 *Chan. Ca.* 25.

 5. Upon

5. Upon a Motion for Leave to examine after Publication upon making the uſual Oath of not having ſeen the Depoſitions, the Lord *Keeper* declared, that in ſuch a Caſe, the other ſide ſhould be at Liberty to examine at large as well as croſs examine the Witneſſes produced by the Party that made the Motion, (which was all he might do formerly) and his Reaſon was, that a Crafty Solicitor may lie on the Lurch, and examine nothing till after Publication is paſt; and the other Party may think himſelf ſecure, and ſo not examine to thoſe Points, which he could otherwiſe have proved, in Regard he finds his Adverſary has not examined to thoſe Matters: And when once Publication is paſt, and the Party that examined has ſeen his own Depoſitions, then the Side that lay ſtill having tied up his Adverſary, ſo that he can only croſs examine the other's Witneſſes, applies for on Order upon the uſual Affidavit to inlarge Publication; and when he has got that Order, then he comes in with a whole Cloud of Witneſſes: And tho' it may be thought hard that any one ſhould have Liberty to examine after he has ſeen the Depoſitions, yet his Lordſhip thought it a reaſonable Penalty on ſuch as would not examine in Time, or that ſhould lie on the Catch, to take Advantage of the other Party, and ordered the Regiſter to take Notice of it as a fixt Rule for the Future. *Mich.* 1684. 1 *Vern.* 253.

6. If Interrogatories are exhibited in the Examiner's Office, and Witneſſes examined thereon, either Party may without Application to the Court, or Order for that Purpoſe, exhibit one or more Interrogatories, or a new Set of Interrogatories for further Examination of the ſame or other Witneſſes: But when a Commiſſion is taken out, there no new Interrogatories, or Set of Interrogatories can be exhibited without Motion and Order of the Court; and the Reaſon of the Difference is, becauſe the Examiner is an Officer of Credit, and ſworn, and therefore preſumed to be impartial, and that he will not diſcloſe the Depoſitions; whereas Commiſſioners are private Perſons, and therefore without Leave of the Court no new Interrogatories can be added before them; agreed by the Court and Bar. *Paſch.* 1714. between *Andrews* and *Brown.*

## (E) Of examining Witneſſes de bene eſſe, and eſtabliſhing their Teſtimony in Perpetuam rei Memoriam.

1. A Cauſe having been heard, and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants *de bene eſſe*, which was ordered, unleſs Cauſe was ſhewn; and the Defendant's Counſel in ſhewing Cauſe took this Difference, *viz.* that altho' it was in (*a*) Order of Courſe to examine a Defendant *de bene eſſe*, ſaving juſt Exceptions; yet when the Cauſe was open, and it

(*a*) After a Bill filed in any Cauſe, the Court will, on Affidavit, that any of the Witneſſes are aged or infirm, ſick, or going beyond Sea, ſo that the Party is in Danger of loſing their Teſtimony, order them to be examined *de bene eſſe*, which will make their Depoſitions valid in that Cauſe only, and againſt thoſe who are Parties to it; but if it appear, that they might afterwards have been examined in Chief, regularly, ſuch Depoſitions ſhall not be made uſe of. To eſtabliſh Teſtimony *in Perpetuam rei memoriam*, a Bill muſt be filed againſt all thoſe concerned in Intereſt, ſetting forth the Title, and that the Party is in Danger of loſing the Benefit of the Teſtimony of ſeveral Witneſſes by their Age, Sickneſs, &c. and the Depoſitions taken in ſuch a Caſe will not only bind the Parties in that and all other Suits, but likewiſe all thoſe claiming by or from them. *Vid. Stile's Pract. Reg.* 587.

appeared that the Defendants were Parties intereſted, it was proper to ſhew it as Cauſe againſt ſuch an Order before the Witneſſes were examined; which Difference was allowed of; but it appearing in this Caſe, that the Defendants had given Releaſes of their Right, the Cauſe was diſallowed. *Paſch.* 1687. between *Glover* and *Faulkner*, 1 *Vern.* 452.

2. The Plaintiff examined his Witneſſes *de bene eſſe*, in *Mich.* Vacation, and in *Hill.* Term following, the Defendant put in his Anſwer; and five Weeks afterwards, before any Replication filed, or Examination in Chief, the Witneſſes died; and it was moved, that this Depoſition might be read; and it was likewiſe prayed, that it might be made uſe of at Law (altho' by the ſtrict Rules of the (*b*) Common Law, no Depoſitions of Witneſſes taken *de bene eſſe*, or before Iſſue joined can be read or given in Evidence) and that the Defendant might be ordered not to oppoſe the Reading of it at the Trial there; which my Lord *Keeper* held reaſonable; for that otherwiſe an Examination *de bene eſſe* would be to no Purpoſe. 1 *Vern.* 331.

(*b*) Whether ſuch Evidence ought to be admitted at Law. *Vid.* 1 *Salk.* *Cro. Eliz.* 352. *Hard.* 332. *Raym.* 335. *Hob.* 112. *Godb.* 336.

3. If one makes a Will, and afterwards becomes a Lunatick, a Bill will not lie to perpetuate the Teſtimony of the Witneſſes to it in the Lunatick's Life-time. 1 *Vern.* 105.

4. If there are two Perſons, and each of them pretends to be the Purchaſer of a Reverſion after an Eſtate for Life, and one of them exhibits his Bill to try his Title, and to perpetuate the Teſtimony of his Witneſſes; ſuch Bill will be diſmiſſed, not being proper in the Life-time of Tenant for Life. 2 *Vern.* 159.

5. A Bill was exhibited to examine Witneſſes *in Perpetuam rei memoriam*, to prove a *Modus Decimandi*; the Defendant demurred, for that the Bill was to eſtabliſh a Cuſtom againſt the Church, and in Prejudice of Tithes, which are due *Communi Jure*; and ſeveral Precedents were cited, where Bills to have a *Modus* decreed were upon a Demurrer diſmiſſed; but this Bill being only to preſerve Teſtimony, the Lord *Keeper* thought it reaſonable the Defendant ſhould Anſwer, and over-ruled the Demurrer. 1 *Vern.* 185. *Vid.* 1 *Vern.* 308, 441.

6. But where a Bill was exhibited to prove a Will, and to perpetuate the Teſtimony of the Witneſſes, the Defendant pleaded himſelf a Purchaſer without Notice of any ſuch Will; and inſiſted, that unleſs there had been a Verdict in Affirmance of ſuch Will, (nothing hindring the Plaintiff, but that if he had a Title, he might recover at Law) the Plaintiff ought not to be admitted to examine the Witneſſes, thereby to hang a Cloud over a Purchaſer's Eſtate; and upon Debate the Court allowed the Plea. *Hill.* 1685. between *Bechinal* and *Arnold*, 1 *Vern.* 354.

CAP.

# CAP. XXIX.

## Executors and Administrators.

(A) Executors, in what Cases more or less favoured in a Court of Equity, than elsewhere.

(B) What shall be Assets.

(C) When upon the Death of one of the Executors, the Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other.

(D) Where the Surplus of the Personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin to the Testator.

(E) Of Remedies by one Executor against another, and how far the one shall be answerable for the other.

(F) Of Administration, to whom to be granted, who are intitled to a Distribution, and in what Proportion, and here of bringing into Hotch-pot.

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### (A) Executors, in What Cases more or less favoured in a Court of Equity, than elsewhere.

1. *A.* By Will gave the three Children of *B.* (the Eldest of whom was not ten Years old) 200*l.* *B.* the Father, sued the Executor in the *Consistory Court* for these Legacies, who brought his Bill, offering to pay them, provided he might be indemnified; to which the Father demurred, because the Matter was properly cognisable in the *Consistory Court*; but the Demurrer was over-ruled; my Lord Chancellor declaring, that the Matter was proper here, and that if the Matter had proceeded to a Sentence in the Ecclesiastical Court, it would be proper to come here for the Executor's Indemnity; and that here Legatees were to give Security to refund, but not there; and this Court will see the Money put out

out for the Benefit of the Children. *Hill.* 1681. between *Horrel* and *Waldron*, 1 *Vern.* 26.

2. If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition ſhall go. 1 *Vern.* 93. *per* Lord *Chancellor.*

3. The Plaintiff being Executor, and his Teſtator greatly indebted, and being deſirous to be rid of the Aſſets, as far as they would go, and that his Payments might not be afterwards queſtioned, brought a Bill againſt all the Teſtator's Creditors, to the Intent they might, if they would, conteſt each other's Debts, and diſpute who ought to be preferred in Payment: The Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter, wherein he was not concerned; but the Court over-ruled the Demurrer, and held it a proper Bill, and a ſafe Way for the Executor to take. 2 *Vern.* 37.

4. A Widow poſſeſſed herſelf of her Husband's Perſonal Eſtate, and paid ſeveral of his Debts, and after his Executor got the Eſtate out of her Hands; and upon a Bill preferred by her, it was decreed by Conſent of Counſel, that ſhe ſhould be allowed for all Payments made, which were incumbent on the Executor to pay, according to the Courſe of Law; but as to Payments made out of Order and Rule, which the Law left the Executor liable to, ſhe ſhould not be allowed, if they were to the Prejudice of the Executor. 15 *Car.* 2. between *Ayer* and *Ayer*, 1 *Chan. Ca.* 33.

5. If a Widow poſſeſſes herſelf of the Perſonal Eſtate as Executrix under a revoked Will, and pays Debts and Legacies, but has no Notice of the Revocation, ſhe ſhall be allowed thoſe Payments in Equity. *Vid.* 1 *Chan. Ca.* 126.

6. But where an Adminiſtrator poſſeſſed himſelf of the Inteſtate's Goods, and deviſed Legacies and died, and his Executor, without Compulſion, and pending a Suit in Right of the Inteſtate to recover the Goods, paid the Legacies; and the Court would not relieve him, becauſe the Payment was voluntary, and with Notice, that the Right to the Inteſtate's Goods was controverted. 31 *Car.* 2. between *Hodges* and *Waddington*, 2 *Chanc. Ca.* 9.

7. If an Adminiſtrator exhibits a Bill for a Diſcovery of the Perſonal Eſtate of the Inteſtate, and the Defendant pleads, that the Party made a Will, and that it is now litigated in the Spiritual Court; yet Equity will decree a Diſcovery. *Mich.* 1682. between *Wright* and *Blicke*, 1 *Vern.* 106.

8. If three ſeveral Actions at one Time are brought againſt an Executor, and he to each Action pleads *Riens entre maines ultra* 100 *l.* and ſo upon each Action there is Judgment for 100 *l.* and therefore prays an Injunction; yet *per* Lord *Keeper*, he can have no Relief; for in Caſes proper for Law, a Man muſt defend himſelf by legal Pleadings; and every Executor ought to be careful in the firſt place to cover his Aſſets with a Judgment. 1 *Vern.* 119.

9. So where an Adminiſtrator exhibited a Bill to be relieved after a ſpecial *Plene adminiſtravit* pleaded; and a Verdict and Judgment thereon, upon Pretence that the Attorney at Law, without Direction pleaded, that the Defendant had not Notice of the Original, until the 12th of *March*, and had then fully adminiſtred; and Iſſue taken, that the Defendant had Notice before the 12th, *viz.* the 6th of *March*; whereas in Truth he had fully adminiſtred before the 6th of

*March*, and before the Original purchaſed, ſo that the Right was never tried at Law; yet the Bill was diſmiſſed at the Rolls, and the Diſmiſſion affirmed upon an Appeal to the Lord *Keeper*. *Mich.* 1695. between *Stephenſon* and *Wilſon*, 2 *Vern.* 325.

10. But where an Executor exhibited a Bill to be relieved againſt a Judgment obtained againſt him, and ſurmiſed that he gave Directions to his Attorney to plead ſpecially, that he had not Aſſets *ultra* what would ſatisfy Debts of a higher Nature; but that the Attorney pleaded generally *Plenement Adminiſt.* and on the Iſſue, a Letter which he had been perſuaded to write by the Importunity of the Defendant's Friends, giving an Account of the Teſtator's Eſtate, and in which was an Acknowledgment of 300 *l.* due to the Teſtator on a Mortgage, was given in Evidence, and held ſufficient by the Court and Jury to charge him; but he proving that this Mortgage was worth nothing, there being three Precedent Mortgages on the ſame Eſtate; and that he had not Notice of it at the Writing of the Letter; the Court relieved him. *Trin.* 1690. between *Robinſon* and *Bell*, 2 *Vern.* 146, 147.

11. In Debt againſt an Executor for 700 *l.* the Executor pleaded *ne unques Executor*, and on proving at the Trial, that a Chimney-back, or ſome other ſlight Thing came to the Defendant's Hands, the Plantiff had a Verdict; but Equity relieved againſt it, cited by *Hutchins* Lord Commiſſioner, to be adjudged in Lord *Bacon*'s Time. 2 *Vern.* 147.

12. So in another Caſe upon the like Plea of *ne unques Executor*, the Plaintiff proved the Defendant took Money for a Pot of Ale, ſold by the Teſtator in his Life-time; and Equity relieved; between *Cryer* and *Goodhand*, 2 *Vern.* 148. cited by *Hutchins* Lord Commiſſioner, to be adjudged by Lord *Nottingham*.

13. The Executor of an Executor ſhall be liable in Equity for any Waſte or Wrong done by his Executor; altho' at Law it is conſidered as a Perſonal Tort, which dies with the Executor. 2 *Chan. Ca.* 217. *per* Lord *Chancellor*.

14. An Executor of an Executor is not liable at Law, but there may be Remedy had againſt him in Equity. 2 *Mod.* 293. the Executor of an Executor, who commits a *Devaſtavit*, liable in Equity. 1 *Chan. Ca.* 303.

15. If *A.* deviſes Legacies and makes *B.* and *C.* Executors, and *B.* makes *C.* and *D.* his Executors, and dies; and they poſſeſs themſelves of the Eſtate of *A.* they may be both charged in Equity; for tho' in Point of Law, the Executorſhip ſurvived to *C.* and *D.* is not privy, yet the Eſtate of *A.* in whoſe Hands ſoever, ought to be liable. *Trin.* 15 *Ca.* 2. between *Nicholſon* and *Sherman*, 1 *Chan. Ca.* 57. reſolved upon Demurrer. *Vid.* 2 *Vern.* 75. that a Creditor may follow the Teſtator's Eſtate into whoſe Hands ſoever it comes, notwithſtanding any Aſſignment of it by the Executor.

16. If *A.* makes *B.* Executor, and after Debts and Legacies paid, deviſes *reſiduum bonorum* to *C.* if *B.* put not in all the Goods into his Inventory, or under-values thoſe he puts in; *C.* before the Debts are paid, may ſue *B.* in Equity, to enforce him to ſhew the very Value of the Goods. *Paſch.* 1 *Car.* 1. *Palm.* 402. *per Dodd* and *Crew*.

17. A Bill may be exhibited in Equity to diſcover Aſſets, 2 *Chan. Rep.* 37. againſt an Executor, and he thereupon decreed to pay Debts and Legacies, 2 *Chan Ca.* 200. muſt charge that Goods came to his Hands, 1 *Chan. Ca.* 226. but not till he is ſued at Law. *Hard.* 115. *Q.*

18. *A.* was bound to *B.* in a Bond of 100 *l.* and *B.* made his Will, and *C.* Executor thereof; and after declared his farther Will, that *A.* ſhould have the Bond and died; *C.* proved the Will, but omitted this Codicil; and to compel him to prove it, *A.* ſued *C.* before the, *&c.* Pending which the Bond was ſued at Law; *A.* having filed his Bill for Relief, it was reſolved that there ſhould be no Relief for the Legacy before the Codicil proved, and that then he ſhould be relieved againſt the Bond by Reaſon of the Legacy; but the Court ſupported the Injunction till, *&c.* *Paſch.* 1657. between *Took* and *Fitz-John. Hard.* 96.

19. A Bill was exhibited, ſuggeſting that the Defendant had ſet up a Will pretended to be made by one, who died in the great Sickneſs in *London*; and that the Defendant pretending to be Executor of it, endeavoured, being Inſolvent, to get in the Debts due to the Teſtator; whereas the Will was unduly obtained, and now litigated in the Spiritual Court; and the Court on Motion ordered, that the Debtors to the Deceaſed's Eſtate ſhould forbear to pay any Money, till the Matter ſettled in the Spiritual Court; although it was urged, that the Objection of Inſolvency might be made to every Executor. *Paſch.* 18 *Car.* 2. between *Smallpiece* and *Anguiſh*, 1 *Chan. Ca.* 75.

20. Equity will oblige an Executor to pay Arrears of Rent, tho' the Perſon of the Teſtator was not liable at Law. 1 *Chan. Ca.* 121.

21. The Defendant's Teſtator gave the Plaintiff 1000 *l.* to be paid at the Age of Twenty-one Years; the Bill ſuggeſted, that the Defendant waſted his Eſtate, and therefore the Plaintiff prayed he might have his Security to pay this Legacy when due; which was decreed accordingly by the Maſter of the Rolls. *Hill.* 20 *&* 21 *Car.* 2. 1 *Chan. Ca.* 121.

22. So where the Teſtator deviſed a Legacy to his Child an Infant, payable at the Age of Twenty-three, and made his Wife Executrix and Reſiduary Legatee, and ſhe married a ſecond Husband and died; and he took out Adminiſtration *de bonis non*, with Will annexed; (his Wife being Reſiduary Legatee) and upon a Suggeſtion of Inſolvency, the Court decreed him to give Security to pay the Legacy when it ſhould become payable. *Mich.* 1691. between *Rous* and *Noble*, 2 *Vern.* 249.

23. If an Executor or Adminiſtrator receives in Money, which was ſecured to the Teſtator, and he lends it out again, and receives Intereſt for it, yet he ſhall not be accountable for the Intereſt; for he lends it out at his own Peril; and there is no Difference when the Debtor voluntary pays in the Debt, and when he is compelled to it: Decreed *Hill.* 31 *Car.* 2. between *Groſvenor* and *Cartright*, 2 *Chanc. Ca.* 21. 2 *Vern.* 197. *S. C.* cited, and ſaid to have been adjudged otherwiſe by my Lord Chancellor, but reverſed in the Houſe of Lords. 2 *Chan. Ca.* 35. *S. P.* decreed. *Vid.* 1 *Vern.* 197. *cont.* and there held by my Lord Chancellor to be reaſonable, that Executors in all Caſes ſhould anſwer Intereſt, if they had uſed the Money in Trade, or received any Intereſt for it; and that the

Objection of the Executors being anſwerable for the Money, if it ſhould miſcarry or be loſt, was of little Force now, becauſe a Man may inſure his Money for *one per Cent.* and therefore decreed the Executor liable, unleſs he made Oath that he kept the Money by him. 2 *Chan. Ca.* 152. *S. C.* that an Executor or Truſtee, tho' not impowered or directed to place out Money at Intereſt, yet if he makes Intereſt, he ſhall be accountable for it: Decreed 2 *Vern.* 548.

24. In this Caſe a Difference was taken by my Lord Chancellor; that if an Executor or Truſtee of Money places it out in the Funds, or on other Security, whereby he gains conſiderably, that he ſhall have the whole Benefit thereof to himſelf, in reſpect of the Hazard he run of being a Conſiderable Loſer thereby, which he muſt have born: But if ſuch Executor or Truſtee were an inſolvent Perſon at the Time of placing out ſuch Truſt Money, there the *Ceſtui que Truſt* ſhall have the whole Benefit gained thereby, as he only would have born the Loſs thereof, if any had happened; the Truſtee or Executor, by reaſon of his Inſolvency being incapable thereof, and conſequently running no Hazard at all. *Mich.* 1718. between *Bromfield* and *Wytherley.*

25. *A.* made his Will, and gave ſeveral Legacies, and made *B.* his Kinſman Executor and Reſiduary Legatee; great Part of his Eſtate conſiſted in *Eaſt-India Stock*, and he by his Will directed his Executor to turn his Eſtate into Money, as ſoon as conveniently might be; *Eaſt-India Stock* bore then a good Price, and ſeveral of the Legatees called for their Legacies; and the Executor taking the Eſtate to be ſufficient to pay all, gave them Bonds for their Legacies, but kept the Stock ſo long, till it fell ſo low, that he had not Aſſets to pay the Legacies; and the Executor brought his Bill to have thoſe, to whom he had given Bonds for their Legacies, abate; and that thoſe that were unpaid might take their Legacies in Proportion, at the Rate the Stock was then at; but my Lord *Keeper* would not give him any Relief againſt thoſe that had Bonds; and as to the others, he was to anſwer for the Stock at the Value it was of at the End of the Year, after the Teſtator's Death. *Hill.* 1702. *Keylinge*'s Caſe.

26. An Executor loſt a Bond due to the Teſtator, which was urged, in Behalf of a Bond-Creditor, he ſhould ſtand charged with, and make good the Debt to the Teſtator's Eſtate; and for the Executor it being inſiſted, that a Bond is not Aſſets at Law, but a Creditor muſt expect until the Money due upon it be recovered; nor is the Loſs of a Bond a *Devaſtavit* at Law, and it would be hard to make the Executor anſwer it out of his own Eſtate, in Caſe the Obligor was inſolvent (as in this Caſe he was) eſpecially in Equity; and the rather, for that the Loſing of the Bond did not loſe the Debt, but might be recovered in Equity; and the Executor had already brought a Bill againſt the Obligor for that Purpoſe; and the Court inclined to charge the Defendant with the Debt, but for the Preſent only directed, that the Executor ſhould proſecute the Suit brought by him againſt the Obligor, with Effect, in order to recover the Money due on the Bond that was loſt, and reſpited the Judgment obtained by the Bond-Creditor in the mean Time. 2 *Vern.* 299.

27. If

27. If an Adminiſtrator brings Trover for Goods, and recovers, and takes Part in Hand, and accepts a Covenant for Satisfaction of the Reſidue, and the Debtor afterwards fails, this is a *Devaſtavit* in the Executor. Between *Norden* and *Levet*, cited by my Lord Chancellor, to be adjudged in *B. R.* and affirmed on a Writ of Error in the Houſe of Lords. 1 *Vern.* 474.

28. An Heir at Law being ſued paid a Bond-Debt of his Anceſtor's, in which he was bound, and afterwards brought his Bill againſt the Executor, to be reimburſed out of the Perſonal Aſſets; the Executor delivered up a Bond of the Teſtator's, and took another Bond from the Obligor, in which *J. S.* was bound as Surety with him; tho' it was admited, that at Law this did charge the Executor as a Converſion and Receipt of ſo much of the Teſtator's Eſtate; yet as the Security was intended to be bettered by it, and as the Heir at Law was Plaintiff, the Court decreed, that the Executor ſhould not be chargeable, but that he ſhould aſſign a Security to the Heir. 1 *Chan. Ca.* 74.

29. *A.* purchaſed a Leaſehold Eſtate of an Executor, who had waſted a great Part of the Aſſets, having Notice, that there was a Bond-Creditor of the Teſtator's, whoſe Debt was 100 *l.* unſatisfied, and out of the Purchaſe-Money he had an Allowance of a Debt of 200 *l.* due to him from the Teſtator, and a Debt of 550 *l.* due to him from the Executor himſelf; the Remainder being 150 *l.* he paid the Executor on a Bill brought by a Bond-Creditor, to have Satisfaction for his Debts out of the Leaſehold Eſtate, being Part of the Teſtator's Aſſets; tho' for the Defendant it was inſiſted, that an Executor may ſell, and with the Money, when he has it, pay his own Debts: And for the ſame Reaſon he may, upon Sale, diſcount and allow the Purchaſer the Debt he owes him; and the rather in this Caſe, becauſe he paid 150 *l.* in Money, with which the Executor might have paid the Plaintiff's Debt; yet it was decreed by the *Maſter of the Rolls*, and confirmed by my Lord *Chancellor* for the Plaintiff; ſaying that the Defendant was a Party, and conſenting to, and contriving a *Devaſtavit*. *Mich.* 1708. between *Crane* and *Drake*, 2 *Vern.* 616.

30. After a Suit commenced in Equity, an Executor ſhall not be allowed any voluntary Payments. *Hill.* 1685. between *Bright* and *Woodward*, 1 *Vern.* 369. *per Curiam.* 2 *Chan. Ca.* 201. *S. P. per Curiam.*

31. So where an Executor confeſſed a Judgment, pending a Bill in Equity, and the Court held that it ſhould not be allowed upon an Account of Aſſets. *Paſch.* 1687. between *Surrey* and *Smalley*, 2 *Vern.* 457. 2 *Vern.* 62. *S. P. per Curiam*; but if he is ſued at Law by one Bond-Creditor, pending a Suit againſt him in Equity by another, he may confeſs Judgment to the Bond-Creditor, who ſues him at Law. 2 *Vern.* 299, 300.

## (B) What shall be (a) Assets.

(a) *Vide* Title *Heir*, and *Creditor and Debtor.*

1. *A.* Purchased Lands in his own Name, and took an Assignment of a Mortgage Term for Years in the Name of two Trustees, and died, leaving his Wife Executrix; and the Plaintiff, his Heir at Law, brought a Bill to have the Term assigned to him, for that it was to attend the Inheritance; which was decreed accordingly; altho' it was insisted upon, in Behalf of the Executrix, that it was a Term in Gross; and that there being no Mention in the Assignment that it should attend the Inheritance, it should be Assets, and enjoyed as a Chattel. *Hill.* 1680. between *Tiffin* and *Tiffin*, 2 *Vern.* 1, 2. but *Q.* if there was any Want of Assets.

2. For where a Man took an Assignment of a Term in a Trustee's Name, and the Inheritance in his own Name, it was held, that tho' by Construction in Equity the Term is attendant upon the Inheritance; yet it shall be Assets for Payment of Debts, as well as a Term in a Man's own Name is Assets at Law; but with this Difference, that the Heir shall have the Benefit of the Surplus of Trust of a Term, and not the Executor, after Debts paid; but if a Term be expresly declared by Deed to be attendant on the Inheritance, then such a Term shall not be made Assets in Equity; but the Reporter says, this Point was not directly in the Case, but came in by Way of Argument only. *Mich.* 1683. between *Chapman* and *Bond.* 1 *Vern.* 188, 189. *vide* 1 *Vern.* 104. that such a Term shall be Assets to pay Debts, tho' not subject to the Custom of *London.* 2 *Chan. Ca.* 152. *S. P. per Curiam*, and a Note added by the Reporter, that it was contrary to former Resolutions.

3. But where *A.* seised in Fee, in Consideration of a Marriage-Portion, demised certain Lands for ninety-nine Years to *B.* and *C.* under the Rent of a Pepper-Corn, upon Trust that they should redemise them in the following Manner, *viz.* to *A.* for ninety-nine *Years* and eleven *Months*, if he should live so long, reserving the Rent of a Pepper-Corn only during the Life of *A.* and after his Decease, a Rent of 1500 *l. per Ann.* during the Life of his Wife, as a Jointure for her; and after her Death a Pepper-Corn for the Residue of the Term; *B.* and *C.* redemised accordingly; *A.* died indebted 9000 *l.* by Bond-Debts, and 18000 *l.* by Simple Contract, and left not above 6000 *l.* Personal Estate; on a Bill brought by the Creditors, to have this Term made Assets, it was held by three Judges, the Master of the Rolls, and my Lord Chancellor, that this Term being raised for a particular Purpose, could not be liable to any other Debts than the Inheritance was; and decreed accordingly. *Pasch.* 1688. between *Baden & al'* and the Countess Dowager of *Pembroke*, 2 *Vern.* 52, 53.

4. By the Statute of Frauds and Perjuries, the Trust of an Inheritance is made (*b*) Assets at Law, but the Trust of a Term is not; and by a Clause in the Statute, when Judgment is obtained against the Testator, the Sheriff may take the Trust-Estate into Execution. 2 *Vern.* 248.

(*b*) What shall be legal, what equitable Assets, *vide* the Order in which Debts shall be paid, Title *Creditor and Debtor*, Letter (B)

5. If *A.* purchaſes a Walk in a *Chaſe*, and takes the Patent to himſelf and his Wife, and *J. S.* during their Lives and the Life of the Survivor, and the Husband dies indebted, yet the Wife ſhall have the Benefit of the Patent during her Life, tho' *A.* had not left Aſſets to pay his Debts; but after her Death, *J. S.* muſt be a Truſtee for the Executor: Decreed. 2 *Vern.* 67.

6. *J. S.* on the Sale of Lands takes a Bond from the Purchaſer, to pay any Sum or Sums of Money not exceeding 500*l.* as he ſhould by Will appoint; and *J. S.* by Will diſtributes it, and appoints Payment of it to ſeveral of his Relations; the Bill was brought by the Creditors of *J. S.* for Satisfaction out of Aſſets; and (*inter alia*) to have the 500*l.* applied towards Payment of their Debts; and the Court held, that *J. S.* having Power to diſpoſe of the 500*l.* it muſt be looked upon as Part of his Eſtate; and decreed it to be Aſſets liable to the Plaintiffs Debts. *Trin.* 1694. between *Thompſon* and *Towne*, 2 *Vern.* 319.

7. So where *A.* by Marriage-Settlement having a Power to charge an Eſtate with any Sum not exceeding 3000*l.* for ſuch Purpoſes as he thought fit, by Deed appointed the 3000*l.* as a Collateral Security, for quiet Enjoyment of an Eſtate he had ſold; and if no Incumbrance did appear, the Appointment was to be void, and by Will deviſed the 3000*l.* to his Daughter; and upon a Bill brought by the Creditors of *A.* the 3000*l.* was decreed to be applied to the Payment of his Debts. 2 *Vern.* 465.

8. If *A.* ſeiſed of a Leaſehold Eſtate to him and his Heirs for three Lives, ſettles it on his Daughter and her Husband for their Lives, Remainder to the Uſe of his own Executors and Adminiſtrators; and the Daughter and her Husband die, and *A.* dies indebted by Simple Contract, having deviſed this Eſtate to his Wife; the Uſe of this Eſtate being limited to the Executors and Adminiſtrators of *A.* makes it Perſonal Eſtate in *A.* and being Perſonal Eſtate, *A.* cannot deviſe it exempt from his Debts, though due but by Simple Contract: Decreed. 2 *Vern.* 719. *Vide* 1 *Vern.* 234.

## (C) Where upon the Death of one of the Executors, the Surplus of the Perſonal Eſtate, after Debts and Legacies paid, ſhall ſurvive to the other.

1. IF a Man makes *B.* and *C.* Executors, and deviſeth to them *reſiduum bonorum, &c.* after Debts and Legacies paid; and after *B.* dies, the Surpluſage ſhall (*a*) not ſurvive, for it ſhall be ſuppoſed, that the Teſtator intended an equal Share to his Executors; and decreed for the Adminiſtrator of *B.* accordingly, but much to the Diſſatisfaction of the Bar; for where the Intention is ſecret, and not declared, it muſt give Way to the legal Intent. *Mich.* 26 *Car.* between *Cox* and *Quantock*, 1 *Chan. Ca.* 238.

(*a*) *Q.* For the Reſolutions ſince have been otherwiſe in Equity; and it ſeems well ſettled, that the Survivor ſhall have the whole by Law; as where a Man deviſed Goods to *A.* and *B.* and the Executor aſſented to the Legacy; and *A.* died, and his Executor ſued in the Spiritual Court for *A.*'s Share, there being no Survivorſhip in ſuch Caſe, by the Eccleſiaſtical Law; whereupon *B.* ſued a Prohibition, and declared; and upon Demurrer and Argument it was adjudged the Prohibition ſhould ſtand; for by the Aſſent of the Executor, the Intereſt was veſted in the Legatees, and became a Chattel in them, governable by the Rules of the Common Law. *Mich.* 29 *Car.* 2. between *Baſtard* and *Stukely*, 2 *Lev.* 209. *Vide* 1 *Lev.* 164. 2 *Jon.* 161, 130.

2. A Man having deviſed the Surplus of his Eſtate, after his Debts paid, to *A.* and *B.* *A.* died; and it was adjudged in the Delegates, and decreed by the Lord *North*, and confirmed by *Jefferies* Lord *Chancellor*, that this was a Joint Deviſe, and ſhould ſurvive to *B.* and the Lord Chancellor's Opinion was, that if *A.* and *B.* had been made (*a*) Executors, and *A.* had poſſeſſed a Moiety of the Goods, and died, it would have been all one. *Mich.* 1687. between Lady *Shore* and *Billingsley*, 1 *Vern.* 482.

(*a*) That it ſhould ſurvive to the Executor, *vide* 2 *Chan. Ca.* 64. *Draper*'s Caſe reſolved; *S. P.* reſolved between *Cox* and *Quantock*, 1 *Chan. Ca.* 238.

3. So where a Man deviſed all the Reſt and Reſidue of his Goods, Chattels and Perſonal Eſtate, to two Perſons, their Executors and Adminiſtrators, and one of them died; and it was, on a Bill brought by his Executor againſt the ſurviving Deviſee, held, that the Survivor ſhould take the whole to his own Uſe, and ſhould not be a Truſtee, as to a Moiety, for the Repreſentatives of him who is dead; and that they were to be conſidered as Jointenants, where Survivorſhip takes Place, as well in Caſes of Chattels, as in Caſes of Inheritance. *Trin.* 1729. between *Cray* and *Willis* at the *Rolls*.

4. *A.* made his Will, and after ſeveral Legacies, gave and deviſed all the Reſt and Reſidue, and Remainder of his Perſonal Eſtate to three Perſons, whom he made his Executors; one of them died in the Life-time of the Teſtator; and the only Queſtion was, whether the two ſurviving Executors ſhould have the Whole, or whether the third Part ſhould be diſtributed according to the Statute amongſt the next of Kin; and the Maſter of the *Rolls*, on Time taken to conſider of the Caſe, and citing moſt of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two ſurviving Executors ſhould take the Whole. *Trin.* 1730. between *Hunt* and *Berkley*, at the *Rolls*.

## (D) When the Surplus of the Perſonal Eſtate belongs to the Executor, or he is to be a Truſtee for the next of Kin to the Teſtator.

1. *A.* By Will deviſed particular Legacies to his Children and Grandchildren, and 10 *l.* a-piece to *A.* and *B.* whom he made Executors, for their Care; the Surplus of the Perſonal Eſtate being 5000 *l.* and upwards; the Queſtion was, whether the Surplus ſhould be a Truſt for the Children, or go to the Executors; and it was decreed (*b*) a Truſt for the Children. *Mich.* 1687. between *Foſter* and *Munt*, 1 *Vern.* 473. *per Jefferies* Lord Chancellor. 2 *Vern.* 648. *S. C.* cited, and ſaid to be affirmed in the Houſe of Lords.

(*b*) Since this Caſe, there hath been Variety of Reſolutions, both in Chancery and the Houſe of Lords on this Head; notwithſtanding which, this Matter ſeems as undetermined as any in Equity; for tho' the Law caſts the whole Perſonal Eſtate on the Executor; yet as the Intention of the Teſtator is chiefly to be regarded in a Will, if it appears by a ſtrong and neceſſary Implication, that the Executor was not to have it to his own Uſe, Equity will decree him a Truſtee for the next of Kin to the Teſtator; and therefore it ſeems agreed, that if Strangers, or diſtant Relations are made Executors, and Legacies are given them for their Care and Trouble, that they ſhall not have the Surplus; but where the Executors are as nearly related, as thoſe who claim as next of Kin, and they have had all Legacies given them, tho' perhaps ſome of them greater, and ſome of them leſs, great Doubt has been; in which Inſtances it has (as appears by the Caſes) been determined according to the Intention of the Teſtator, collected not only from the Words of the Will, but likewiſe from collateral Proof of Teſtator's greater Kindneſs, &c. which upon theſe Occaſions has been admitted ſometimes for the Executor, and ſometimes for the next a-kin.

2. *A.* by

2. *A.* by Will gave ſeveral Legacies therein ſpecified, to all her next of Kin by Name; and likewiſe gave particular Legacies to *M.* and *P.* two diſſenting Miniſters, and made them her Executors, but did not make any expreſs Diſpoſition of the Surplus of the Perſonal Eſtate; and the Executors were obliged to account and diſtribute the Surplus amongſt the next of Kin to the Teſtator. *Mich.* 1698. between *Bayley* and *Powell*, 2 *Vern.* 361. decreed.

3. So where *A.* made *B.* his Executor, and gave him 20*l.* for Mourning, and *B.* not being of Kin to the Teſtator, the Surplus of the Perſonal Eſtate was decreed to be diſtributed. *Paſch.* 7 *Ann.* between *Cook* and *Walker*, 2 *Vern.* 676. *S. C.* cited.

4. So where *A.* gave 100*l.* Legacy, and the Intereſt of 300*l.* to his Wife for her Life, and made her and *B.* and *C.* Executors, and gave to *B.* 20*l.* for Mourning; and the Surplus was decreed to be diſtributed. *Trin.* 7 *Ann.* between *Durwell* and *Bennet*, 2 *Vern.* 677. cited.

5. *A.* made his Will to the Effect following, *I diſpoſe of my Eſtate after-mentioned, and what elſe I have in the World, in Manner and Form following*, and then gives ſeveral Legacies to his Relations, amounting to near the Value of his Eſtate (as appeared by a Calculation of his own Hand-writing by him about that Time made) and made *B.* and *C.* Executors, and gave them 20*l.* and intreated them to take the Trouble of getting in his Eſtate; the Teſtator lived ten Years after, and acquired an additional Eſtate, and died, not having altered, nor new publiſhed his Will; and on a Bill brought by the next of Kin againſt the Surviving Executor, it was decreed, that the ſurviving Executor was but an Executor in Truſt, and that the new acquired Eſtate ſhould go to the Legatees in Proportion to their Legacies. *Trin.* 1690. between *Cordell* and *Noden*, 2 *Vern.* 148. Decreed by the Lords *Commiſſioners*, and *Rawlinſon* reſted much on the Words, *I diſpoſe of my Eſtate after-mentioned, and what elſe I have in the World*, &c.

6. So where one made his Will, and his Wife Executrix, and lived twenty Years after the Will, and acquired an Eſtate; and the Surplus was decreed to be diſtributed. 13 *W.* 3. between *Ward* and *Lane*, 2 *Vern.* 677. cited to be adjudged.

7. *A.* deviſed Lands to be ſold for Payment of his Debts, and wills, that the Surplus ſhall be deemed Part of his Perſonal Eſtate, and go to his Executors, and gives to his Executors 100*l.* a-piece as a Legacy; and the Queſtion was, whether the Executors ſhould have the Surplus to their own Uſe, or ſhould diſtribute according to the Statute of Diſtributions. For the Executors it was inſiſted, that the Surplus ſhould be Part of his Perſonal Eſtate, and go to them, and that he meant it them to their own Uſe; and his giving them a Legacy of 100*l.* a-piece, cannot alter the Caſe, for the Surplus perhaps might be nothing; and therefore he gave them the 100*l.* that they might at all Events be ſure of ſomething, and not to exclude them of the Benefit of the Surplus; and this being a Deviſe of the Surplus after Debts and Legacies paid, cannot be a Truſt in them, for then all their Truſt is performed, when Debts and Legacies are paid. On the other Side it was ſaid, that the Words in the Will, that the Surplus ſhould be Part of his Perſonal Eſtate (*and go to his Executors*) were only intended to exclude the Heir, who elſe would have had it, and not to give any greater Intereſt to his Executors

than they would have had otherwiſe; and of the ſame Opinion was my Lord *Chancellor*; and decreed accordingly. *Hill.* 1697. between the Lord *Briſtol* and *Hungerford.*

8. But where a Man deviſed his Library of Books to *A.* (except ten Books, ſuch as his Wife ſhould chuſe, as Plays, Romances, Sermons, but not Law-Books) and made her Executrix; and it was held by my Lord *Keeper*, that ſhe ſhould not by this Deviſe be excluded from the Benefit of the Surplus of the Perſonal Eſtate. *Trin.* 1704. between *Griffith* and *Rogers* decreed.

9. So where one not of Kin, but a Stranger, was made Executor, and had conſiderable Legacies given him; although it was decreed by Sir *Peter King*, in the *Mayor*'s Court, in Favour of the Teſtator's two Brother's, that the Surplus ſhould be diſtributed; yet upon Appeal to the Houſe of Peers, that Decree was reverſed; not barely as it ſtood upon the Will, but that Parol Proof ought to be received in Favour of the Executor's Title, conſiſtent with the Will; and the Proof being full as to the Teſtator's frequent Declarations, that his Executor, though a Stranger, ſhould have the Surplus; it was decreed accordingly. Between *Littlebury* and *Buckley*, *S. P.* decreed on the parol Proof, between the Lady *Granvill* and the Dutcheſs of *Beauford*, 2 *Vern.* 648. and affirmed in the Houſe of Lords. *Vide* Title *Evidence*, Letter (C).

10. *A.* poſſeſſed of a long Term for Years, by Will deviſed it to his Wife for Life, and after her Death to the Child ſhe was then *enſeint* with; and if ſuch Child died before it came to twenty-one, then he deviſed one third Part of the ſame Term to his Wife, her Executors and Adminiſtrators, and the other two Thirds to other Perſons, and made his Wife Executrix of his Will, and died; and the Bill was brought againſt her by the next of Kin to the Teſtator, to have an Account and Diſtribution of the Surplus of his Perſonal Eſtate not deviſed by the Will; and two Queſtions were made: 1*ſt*, Whether the Deviſe to the Wife of one third Part of the Term was good, becauſe it happened ſhe was not then *enſeint* at all; and ſo the Contingency, upon which the Deviſe to her was to take Place, never happened; the other Queſtion was, whether this Term, being Part of the Perſonal Eſtate, and expreſly deviſed to her for Life, with ſuch other contingent Intereſt on the Death of the ſuppoſed *enſeint* Child before twenty-one, ſhould ſhut her out from the Surplus of the Perſonal Eſtate, which belonged to her as Executrix, and ſo the Surplus go in a Courſe of Adminiſtration, to be diſtributed amongſt the Plaintiffs, as next of Kin. As to the firſt Point, my Lord *Keeper* delivered his Opinion, that tho' the Wife was not *enſeint* at the Time of the Will, yet the Deviſe to her of ſuch third Part of the Term was good; and as to the other Point diſmiſs'd the Plaintiff's Bill, and ſo let in the Executrix to the Surplus of the Perſonal Eſtate, notwithſtanding the Deviſe to her of Part, as aforeſaid. *Mich.* 1711. between *Jones* and *Weſtcomb.*

11. *A.* was Executrix of *B.* her former Husband, and after married *C.* who, by his Will in 1686, deviſed to his Wife the Plate and Goods ſhe brought him in Marriage, and two Silver Salvers, in Lieu of Plate that had been changed away, and made her Executrix, and died, leaving a Daughter by a former Wife, and his Wife *enſeint* of a Daughter; and there being no Deviſe of the Surplus of the Perſonal Eſtate, the Queſtion was, whether ſhe ſhould take it as Execu-

trix to her own Uſe, or liable to Diſtribution; and my Lord *Keeper* decreed the Surplus to the Wife, as well for that this Will was made before the Caſe of *Foſter* and *Munt*, as alſo for that in this Caſe nothing is deviſed to the Wife, but what was her own before; and as ſhe was Executrix to her former Husband; but principally, becauſe where a Wife is made Executrix, it is to be preſumed ſhe was not made ſo to have barely an Office of Trouble but of Benefit, to take the Surplus. *Hill.* 1711. between *Ball* and *Smith*, 2 *Vern.* 675.

12. The Plaintiff married one Mrs. *Allen*, Siſter to *William Allen*, who being poſſeſſed of a Perſonal Eſtate to the Value of about 2000 *l.* and being taken ill makes his Will in Writing the very Day before his Death, and thereby deviſes ſeveral Legacies to his Relations, and amongſt the Reſt, gives the Plaintiff his Siſter about 1000 *l.* and gives 70 *l.* to Mr. *Serle* and his Wife, and their four Children, to buy them Mourning; and gives to his dear and moſt eſteemed Friend, Mrs. *Sarah Serle* (one of the Daughters of Mr. *Serle*, to whom he had made his Addreſſes in Way of Marriage) 500 *l.* and gives his Horſe and Furniture to one of the Defendants, by his Chriſtian Name and Surname, and his Cloaths to be diſpoſed of by his Executors; and then concludes, as to the 700 *l.* I am intitled to in the *South-Sea* Company, and the Reſt of my Perſonal Eſtate, I will, that the ſame ſhould be ſold for Payment of my Debts and Legacies, and I make Mr. *John* and Mr. *Thomas Serle* my Executors, and dies; the Executors were two of the Children of Mr. *Serle*, and intitled to their Proportion of the 70 *l.* deviſed for Mourning, and one of them to the Horſe and Furniture; but were no Ways related to the Teſtator. The Surplus of the Perſonal Eſtate came to about 600 *l.* and this Bill was brought againſt the Defendants the Executors to have an Account thereof; and that it might be paid to the Plaintiff, whoſe Wife was the only Siſter and next of Kin to the Teſtator. And for the Plaintiffs it was inſiſted, that the Executors were meer Strangers, no Ways related to the Teſtotor, and that they had particular Legacies left them for Mourning out of the 70 *l.* and one of them had a Horſe and Furniture expreſly deviſed to him; and therefore it was not reaſonable that they ſhould go away with the Surplus of the Perſonal Eſtate. On the other Side it was inſiſted, that the Defendants being Executors, they repreſented the Teſtator; that they ſtood in his Place, and were intitled to whatever he left undiſpoſed of; that this was the antient Law for many Ages, and therefore the legal Title being in them, they ought not to be defeated of it, without a manifeſt Intention of the Teſtator to the contrary; that here appeared no ſuch Intent in the Will, for they are not named, either by the Chriſtian Name or Surname, or ſo much as by the Name of their Office, till the very Cloſe of the Will; nay, it was in Proof, that the Teſtator did not ſo much as conſider whom he ſhould make his Executors, till he had diſpoſed of all the Legacies; that the giving one of them his Horſe and Furniture, was only to exclude the other, who, by being Executor with him, would have been equally intitled to it, and could not be conſtrued a Legacy to ſhut them out of the Surplus, ſince it rather regarded the other Executor than the Plaintiff, the next of Kin; that they had it fully in Proof, that the Teſtator being asked, whether he would not give his Siſter more? anſwered he would not; that being asked, who ſhould have the Surplus, or what ſhould become of the Surplus? he ſaid

his Will ſhould ſtand as it was, and that he had a very great Regard for the Defendants Family, and was to have married their Siſter; that theſe Proofs being in Affirmance of the Diſpoſition which the Law made to the Executors might be read; and that ſeveral Reſolutions, ſince the Caſe of *Foſter* and *Munt*, had pared away the Authority of that Caſe, and therefore prayed that the Bill may be diſmiſſed. My Lord *Chancellor* was clearly of Opinion, that the Proofs being in Affirmance of the Diſpoſition, ought to be read, and ſaid, that they were ſo full as to make an End of this Caſe; that without a ſtrong and violent Implication, the Executors ought not to be defeated of the *Reſiduum*; that here was no ſuch Implication in this Will, but rather the contrary; that to make Senſe of the laſt Clauſe, it muſt be conſtrued as a Deviſe of the *South-Sea* Stock, and the Reſt of his Perſonal Eſtate, to his Executors; for it immediately follows, and I make *John* and *Thomas Serle* my Executors, which could have no Relation to the Direction for Sale, unleſs by giving them the Surplus which ſhould ariſe by Sale; and as there appeared no ſtrong or violent Implication to induce any other Conſtruction, he could not give into ſo great a Change of the Law, but muſt decree for the Executors; and accordingly did ſo. *Hill.* 1716. between (*b*) *Batchelor* and *Serle*. (*b*) 2 *Vern.* 736. *S. C.*

## (E) Of Remedies by one Executor againſt another, and how far the one ſhall be anſwerable for the other.

1. IF two Executors make Partition of the Specialties, *&c.* of the Teſtator, and after one of them releaſes an Obligation, which by the Partition belonged to the other; tho' the Debtor had Notice of the Partition, yet the other Executor ſhall not be relieved in Equity, unleſs the Releaſe was procured by Fraud, or without a full Satisfaction; the Debtor muſt then ſatisfy the Overplus. *Moor* 620. but *vide Hard.* 168. and *Q.* whether he has not Remedy againſt the Executor.

2. *A.* made *B.* and *C.* Men of good Credit his Executors; *C.* being a Banker received all the Money, but *B.* joined with him in the Receipts, taking his Note, to ſhew that he received not the Money; and *per Harcourt* Lord *Chancellor*, if two Truſtees join in a Receipt, and one receives the Money, he only who receives ſhall be liable: If there be two Executors, and they join in a Receipt, and one only receives the Money; as to Creditors, who are to have the utmoſt Benefit of the Law, each is liable for the Whole, tho' one Executor alone might give a Diſcharge, and the Joining of the other was unneceſſary; but as to Legatees and thoſe claiming Diſtribution, who have no Remedy but in Equity, the Receipt of one Executor ſhall not charge the other; for the Joining in the Receipt is only Matter of Form, the ſubſtantial Part is the actual Receiving; and this only is regarded in Conſcience. *Mich.* 12 *Ann.* between *Churchill* and *Hobſon*, 1 *Salk.* 318.

3. But where one made two Executors, and deviſed all his Eſtate to his Wife for Life, and after to be equally devided amongſt the Plaintiffs, who brought their Bill againſt the Executors for an Account;

count; and the Defendants, by Anſwer, charge themſelves jointly, and diſcharge themſelves jointly; and *inter alia* charge themſelves with two Notes for 200*l.* *Eaſt-India* Stock, and afterwards, pending the Suit, ſold the ſaid *Eaſt-India* Stock, and joined in the Tranſfer of it; but whether any Acquittance were given for the Purchaſe-money did not appear: *Cox*, one of the Executors, becomes inſolvent; and if *Pitt*, the other, ſhould be charged with the whole Purchaſe-money, or only a Moiety, was the Queſtion. *Pitt*, on Examination after the Hearing, having ſworn he was perſuaded by *Cox* to join in the Sale, but received only a Moiety of the Money; and it was decreed by the Maſter of the *Rolls*, and affirmed by my Lord *Keeper*, that he ſhould be charged with the Whole, notwithſtanding the Caſes of *Heaton* and *Marriott*, and *Fellows* and *Owen*; for they were Truſtees of a Real Eſtate, where there was a Neceſſity for both to join; but theſe were Executors, where no ſuch Neceſſity was; for one Executor might have ſold without the other; beſides, this was done *pendente lite*, and no Application made to this Court; and there is nothing to diſcharge *Pitt*, but his own Examination. *Hill.* 1708. between *Murrell* and *Cox* and *Pitt*, 2 *Vern.* 570. *S. C.*

## (E) Of Adminiſtration, to whom to be granted, who are intitled to a Diſtribution, and in what Proportion; and here of bringing into Hotchpot.

1. IF an Inteſtate dies before the Year 1670. yet Adminiſtration being granted after the Making of the (*a*) Statute, his Perſonal Eſtate is liable to a Diſtribution. *Mich.* 1709. between *Brice* and *Whiteing*, 2 *Vern.* 642.

(*a*) By the 22 & 23 *Car.* 2. *cap.* 10. All Ordinaries and Eccleſiaſtical Judges, upon granting Adminiſtration, muſt take Bond of the Adminiſtrator, with two or more Sureties, with Condition, that the Adminiſtrator ſhall make a true and perfect Inventory of all the Goods and Chattels of the Deceaſed, and exhibit it into the Regiſtry of the Ordinary's Court by ſuch a Day, and to adminiſter according to Law, and to make a true and juſt Account thereof, and to make Diſtribution as followeth, *viz.* one Third to the Wife of the Inteſtate, the Reſidue amongſt his Children, and ſuch as legally repreſent them, if any are dead, other than ſuch Children who ſhall have any Eſtate by Settlement of the Inteſtate in his Life-time, equal to the other Shares; but thoſe Children who have been advanced by Settlements or Portions by the Inteſtate, not equal to the other Shares, ſhall have ſo much of the Surplus as will make all equal; and the Heir at Law ſhall have an equal Share in the Diſtribution with the other Children, without any Conſideration of what he had by Deſcent or otherwiſe, from the Inteſtate. If there are no Children, nor legal Repreſentatives of them, in ſuch Caſe, one Moiety ſhall be allotted to the Wife, the Reſidue equally to the next of Kin of the Inteſtate, in an equal Degree, and thoſe who legally repreſent them; there ſhall be no Repreſentation amongſt Collaterals, after Brothers and Siſters Children; and if there is no Wife, then all ſhall be diſtributed amongſt the Children; and if no Child, then to the next of Kin to the Inteſtate, in an equal Degree, and their Repreſentatives; no Diſtribution ſhall be made till a Year after the Inteſtate's Death; and every one to whom any Share ſhall be allotted, ſhall give Bond, with Sureties in the Spiritual Court, that if Debts ſhould afterwards appear, to refund his ratable Part thereof, and of the Charges of the Adminiſtration. By the 29 *Car.* 2. *cap.* 3. the above Act ſhall not extend to the Eſtates of Feme Coverts that die inteſtate, but that their Husbands ſhall have Adminiſtration of their Perſonal Eſtates, as before the Making of the Act; and the Husbands are not compellable to make Diſtribution of their Perſonal Eſtates. By the 1 *Jac.* 2. *cap.* 17. No Adminiſtrator ſhall be cited to render an Account of the Perſonal Eſtate of the Inteſtate, otherwiſe than by Inventory, unleſs it be at the Inſtance of ſome Perſon, in Behalf of a Minor, or of one having a Demand out of ſuch Perſonal Eſtate, as Creditor, or next of Kin. If after the Death of the Father, any of his Children ſhall die inteſtate, without Wife or Children, in the Life of the Mother, every Brother and Siſter, and the Repreſentatives of them, ſhall have an equal Share with the Mother; ſuch Part of any Inteſtate's Eſtate within the City of *London* or Province of *York*, as any Adminiſtrator hath by Virtue only of being Adminiſtrator, ſhall be ſubject to Diſtribution, as in other Caſes; and the Cuſtom obſerved therein ſhall not be ſubject to extend to it.

2. If Adminiſtration is granted to two, and one dies, yet the Adminiſtration does not ceaſe, for it is not like a Letter of Attorney to two, where by the Death of one, the Authority ceaſes; but is rather an Office; and Adminiſtrators are enabled to bring Actions in their own Names, come in the Place of Executors, and therefore the Office ſurvives. *Mich.* 1705. between *Adams* and *Buckland*, 2 *Vern.* 514. *per* Lord *Keeper*.

3. If a Man makes his Will, and his Son Executor, but makes no Diſpoſition of the Surplus of the Perſonal Eſtate; the Son dies without proving of the Will; the Teſtator is dead Inteſtate as to the Surplus, and the ſame ſhall be diſtributed amongſt the next of Kin of the Teſtator. 2 *Vern.* 634. *Vid.* 2 *Mod.* 101.

4. On the Statute for the better ſettling of Inteſtates Eſtates; the Queſtion was on that Clauſe of the Statute, that there ſhould be no Repreſentations among Collaterals beyond Brothers and Siſters Children, whether to be intended of Brothers and Siſters to the Inteſtate; or whether, when Diſtribution falls out amongſt Brothers and Siſters, though remote Relations to the Inteſtate, Repreſentation ſhall be admitted; and the Court held, that the Repreſentation ſhould be only between the Brothers and Siſters to the Inteſtate. *Trin.* 1691. between *Maw* and *Harding*, 2 *Vern.* 233. *S. P.* reſolved on a Motion for a Prohibition in *B. R.* 1 *Salk.* 250. *vid.* 2 *Vern.* 168. *S. P.* but no Reſolution.

5. If one dies Inteſtate, leaving a Grandmother, and Uncles and Aunts, the (*b*) Grandmother is intitled to the Perſonal Eſtate, in Excluſion of the Uncles and Aunts. *Trin.* 1719. between *Woodrooff* and *Winkworth*, held clearly *per Curiam*. (*b*) 1 *Salk.* 251. *S. P.* reſolved.

6. If there be Grandfather, Father, and Son, and the Father dies Inteſtate, the Son ſhall have the Adminiſtration, and not the Grandfather. *Vid.* 2 *Vern.* 125.

7. *A.* had three Brothers, one died, leaving three Children, another Two, and the third Five; then *A.* died Inteſtate; and it was reſolved, that Diſtribution ſhould be *per Capita*, and not *per Stirpes*, and that all the Children ſhould have equal, becauſe none take by Way of Repreſentation, but all as next of Kin. *Mich.* 1695. between *Walſh* and *Walſh*, reſolved *in Canc'*.

8. A Man died Inteſtate, leaving a Brother of the whole Blood, and Siſter of the half Blood; and it was held that the Siſter of the half Blood ſhould come in for an equal Share with the Brother of the whole Blood. Between *Smith* and *Tracy*, 1 *Mod.* 209. 1 *Vent.* 316. 2 *Lev.* 173. 1 *Vern.* 437. 2 *Vern.* 124. *S. P.* between *Crooke* and *Watt*. Reſolved and affirmed in the Houſe of Lords on great Debate. *Show. P. C.* 108. 2 *Vent.* 317. *S. C.*

9. The Plaintiff's Father, on the Marriage of the Daughter of *B.* covenanted, in Caſe of a ſecond Marriage, to pay the firſt Son by the firſt Wife 500 *l.* there was a Son and ſeveral other Children of the firſt Marriage; the Father died Inteſtate; and it was held, that the Heir muſt bring the 500 *l.* into Hotchpot, although in Nature of Purchaſer under a Marriage-Settlement. *Hill.* 1708. between *Phiney* and *Phiney*, 2 *Vern.* 638, 639.

10. Mr. *Freeman* (late Chancellor of *Ireland*) in the Year 1693. on his Marriage, entred into Articles, in Conſideration of the ſaid Marriage, and of 4000 *l.* Portion, to ſettle ſuch an Eſtate to the Uſe of himſelf for Life, Remainder to his intended Wife for Life,

Remainder to the first and other Sons of the Marriage successively in Tail Male, Remainder to Trustees for 1000 Years, in Trust to raise Portions for Daughters, in Case there were no Sons; that is to say, if but one such Daughter, the Sum of 5000 *l.* and if Two, or more, then the Sum of 6000 *l.* equally between them, to be paid and payable at her and their respective Age or Ages of eighteen Years, or Days of Marriage, which should first happen; and 80 *l. per Ann.* Maintenance in the mean Time, to each Daughter, with Remainder to his own right Heirs, and gave a Bond of 10000 *l.* Penalty, for Performance of Covenants; the Marriage takes Effect, and they had Issue one Daughter only, and no Son; then the Wife dies, and afterwards Mr. *Freeman* married a second Wife; and on that Marriage made a Settlement of this Estate amongst others; but the second Wife, or her Trustees, had no Notice of the Articles made on the first Marriage. Afterwards Mr. *Freeman* died Intestate, leaving a Son and a Daughter by his second Wife, and left a Personal Estate to the Amount of 20000 *l.* and upwards, at the Time of his Death, which was in 1710; the Daughter by his first Wife, at that Time, was about twelve Years of Age, and some Time since intermarrying with the Plaintiff, they brought their Bill to have an Account of the Personal Estate of Mr. *Freeman*, and their distributory Share thereof; and the only Question was, whether this 5000 *l.* should not be looked upon to be so far an Advancement of the Plaintiff, the Wife, that if she would have any farther Share of her Father's Personal Estate, they must bring this 5000 *l.* into Hotchpot, upon the several Clauses and Intent of the Statute 22 & 23 *Car.* 2. for the Distribution of Intestates Estates.

For the Plaintiffs it was argued, that they were intitled to a distributory Share of the Personal Estate left by the Father at the Time of his Death, without Regard to this 5000 *l.* which was no Advancement, either within the Words or Meaning of the Act of Parliament, which intended only an Advancement of Children after they come *in esse*, and when they were about being married or disposed of in the World; but this, if any, was an Advancement long before the Plaintiff was born, and when it was wholly unknown and uncertain, whether there ever would be such a Daughter.

That it was likewise contingent and uncertain, after she was born, whether she would ever be intitled to this Fortune, or not; for if she had died before eighteen, or Marriage, it would have sunk into the Inheritance, for the Benefit of the Heir at Law; according to the Case of *Pawlett* and *Pawlett*, 2 *Vent.* And she was but twelve Years of Age at the Time of her Father's Death, and therefore might have died before she was intitled to this 5000 *l.*

That her distributive Share of her Father's Personal Estate vested in her immediately on her Father's Death, or not at all, and then it could not be devested out of her, by the Accident of her attaining eighteen, or being married, whereby this 5000 *l.* became due.

That this 5000 *l.* was a Debt upon the Father's Estate, which she was intitled to as a Creditor or Purchaser, in Consideration of her Mother's Marriage and Portion; for which was cited the Case of *Feast* and *Feast*, 3 *April*, 1726. where, on a Marriage-Treaty, Sir *Felix Feast* covenanted to leave his Wife 2000 *l.* at his Death, 2000 *l.* to his eldest Son, and 1000 *l.* a-piece to his younger Children, and afterwards, being a Freeman of *London*, died, leaving several younger

Children; and it was held in that Caſe, that the 1000*l.* a-piece to the younger Children being due only by Covenant, was a Debt on the Perſonal Eſtate; and not being to be paid till after the Father's Death, was no Proviſion or Advancement, either within the Statute of Diſtributions, or the Cuſtom of *London*, to bar them of their cuſtomary or diſtributory Shares of their Father's Perſonal Eſtate, which were greatly advanced at the Time of his Death.

To ſhew that this was not an Advancement within the Statute, were conſidered the ſeveral Clauſes of the Act; and it was urged,

1*ſt*, That the Statute mentions only two Caſes wherein there is to be any bringing into Hotchpot: 1*ſt*, Where the Child had been advanced by the Father with any Eſtate. 2*dly*, Where he had been advanced with any Portion; as to the firſt, the Plaintiff cannot be ſaid to have any Eſtate by theſe Articles, for the Word *Eſtate* in the Statute means Lands in Oppoſition to Portion; and in the latter Part of it, 'tis mentioned Lands by Settlement expreſly; but in the preſent Caſe the Plaintiff cannot be ſaid to have any Proviſion of Lands, the Settlement of the Lands being only in the Nature of a Mortgage, for her Portion. 2*dly*, That this Portion is not within the Statute, as an Advancement by the Inteſtate in his Life-time, being neither payable nor demandable till after his Death; and therefore in the Caſe of *Rowland* and *Shepherd*, where the Father agreed to give in Marriage with his Daughter, the Sum of 7000*l.* to be paid by Inſtalments of 1000*l.* a Year, and the Father had paid 6000*l.* of this Portion, but died before the laſt 1000*l.* became due; and on a Bill brought for a Diſtribution of his Perſonal Eſtate, it was decreed by Lord *Macclesfield*, and affirmed by your Lordſhip, that this 6000*l.* paid, was not Part of the Advancement to be brought into Hotchpot, but that the remaining 1000*l.* was a Debt to be paid out of the Perſonal Eſtate.

2*dly*, That the Statute muſt operate, either at the Time of the Father's Death, or within a Year after at furtheſt; but in this Caſe the Plaintiff was not intitled to her 5000*l.* either in her Father's Life-time, or within a Year after; and is the Diſtribution to wait till it be ſeen, whether ſhe would attain eighteen, or be married?

Suppoſe there had been a Son at the Time of the Father's Death, who had after died without Iſſue, would this Portion have been an Advancement in the mean Time, ſo as to debar her of her diſtributory Share? for being contingent at firſt, ſuch Value cannot be ſet on it in Equity, as Gameſters do on Chances; and if Part is to be laid up till the Contingency happens, it is no Advancement in the mean Time; nor is there any Inſtance, that one diſtributory Share ſhould be laid up to make a Heap.

3*dly*, This 5000*l.* was not a voluntary Proviſion moving from the Father, but the Plaintiff was a Purchaſer thereof, in Conſideration of her Mother's Portion; and ſuppoſe a Child had Money of his own, and agreed with his Father, in Conſideration thereof, to have a Portion from his Father, after his Death; or if a collateral Relation had purchaſed ſuch a Portion from the Father for his Child, certainly this would not be an Advancement; and the Intent of the Statute was to make them all equal out of the Father's Perſonal Eſtate, not out of what was purchaſed for them by others, or by the Mother, as in this Caſe.

And it was likewiſe argued, that this was not a Debt originally payable out of the Perſonal Eſtate, but that it was originally payable out of Lands, notwithſtanding the 10000 *l.* Bond for performing of Covenants; and tho' the Defendants, who claim under the Settlement made on their Mother's Marriage, ſhall not be affected as to the Lands thereby ſettled, for Want of Notice; yet as to the Lands not comprized therein, they ſhall be liable in the firſt place; and if they are not ſufficient, the Perſonal Eſtate muſt be applied in Aid to make it up, by Reaſon of the Bond.

Beſides, no Caſe can be produced where a Portion ſettled by Marriage-Articles had been brought into Hotchpot as an Advancement by the Father; and yet it muſt often have happened, that Fathers who have made ſuch Settlements have died Inteſtate, and is therefore of great Conſequence.

On the other Side it was argued for the Defendants, that in the firſt place no Settlement being made purſuant to the Articles, and the Bond for Performance thereof, the Land will in no Sort be ſubject thereto, but in Aid of the Perſonal Eſtate, if that were deficient; and that too by the Aſſiſtance of a Court of Equity on the Agreement; for between the Heir and Executor, the Perſonal Eſtate ſhall be applied in the firſt place to diſcharge Incumbrances, even on the Real Eſtate, and would have been ſo in this Caſe, where it reſted barely in Covenant, and on the Bond.

That the 5000 *l.* thus provided for by the Settlement, was an Advancement within the Meaning of the Statute, which appears throughout to intend and preſerve an Equality between the Children; and if any *Fineſſe* of Reaſoning were to be made Uſe of in the Conſtruction thereof, it ought rather to be in Support of that Intent.

That the ſubject Matter of the Statute was chiefly Perſonal Eſtate, and yet there is no Reaſon to exclude a Proviſion by a Real Eſtate; and therefore where the Statute ſays, other than ſuch Child who ſhall have an Eſtate by Settlement, why ſhould not that be extended both to Real and Perſonal Eſtate? it is true, the Statute is not perfectly correct, according to the Rules of Grammar; and therefore, where Portion is mentioned in the firſt Part, 'tis omitted in the Second; and what is called Eſtate in the firſt Part, is called Land in the Second.

That if theſe Lands are in Equity to be conſidered as a Settlement of Lands, then it is an Advancement according to the Act; if they are not to be conſidered as a Settlement of Lands, then it is an Advancement by a Portion; and as to the Objection, that this was not a voluntary Proviſion of the Father, but aroſe from the Contract of the Parties; it was anſwered that the Statute makes no ſuch Diſtinction, and therefore neither ought this Court to make it; for the Act only intended an Equality between the Children, whether the Proviſion was voluntary, or by Purchaſe; and a Child provided for either one Way or other, is provided for; and it is not like the Caſes put, where a Child, either with his own or a Relation's Money, purchaſes an Eſtate, or a Sum of Money from the Father; for this certainly is no Proviſion by the Father, but a direct Sale, as much as it would have been to any Stranger; and in the Caſe of *Newland* and *Shepherd*, the Queſtion was not, whether the 6000 *l.*

paid ſhould not be brought into Hotchpot, if ſhe had deſired to be let into a further Share; but whether the 6000 *l.* being more than her ſhare for the Whole, ſhe ſhould, beſides, have the other 1000 *l.* and it was Decreed that ſhe ſhould; beſides there is no Pretence to ſay, that the Cuſtom of *London* is to govern an Act of Parliament.

That this Portion, though not payable 'till after the Father's Death, was, nevertheleſs, a Proviſion for her by him, in his Life-time, as the Act ſpeaks; as the principal Part of it, *viz.* the Security, was executed by him in his Life-time; and as he was not at Liberty to controul it; and ſuppoſe he had given ſuch a Portion at his Death, would not this be a good Proviſion within the Statute; and here the Portion is payable as ſoon as poſſibly it can be wanted, *viz.* at eighteen, or Marriage, and a Maintenance of 80 *l. per Annum* in the mean Time; and tho' it is true, that a Portion out of Lands ſinks in the Inheritance, if the Party dies before it becomes payable; which, if it were of a Perſonal Eſtate it would not; that is not material, ſince the Statute makes no Diſtinction, whether the Portion is payable out of the Real or Perſonal Eſtate.

That if a Bill had been brought immediately after the Father's Death for a Diſtribution, there could be no Inconvenience in ſetting a-part a Sum to anſwer the Contingency, when it ſhould happen, no more than in the Caſe of Debts, which is every Day done; and there are ſome whoſe Eſtates are not got in till ſeveral Years after their Deaths; and a Diſtribution may very properly be made thereof from Time to Time, as they come in; neither is the Diſtribution wholly to wait till they are got in; and in the Caſes of *Finney* and *Finney*, and *Lonoy* and *Hutchinſon*, it was decreed, that the Heir at Law ſhould bring into Hotchpot whatever Share he received out of the Perſonal Eſtate, if he would have any more; and in the Caſe of *Kelway* and *Kelway*, on the Statute 21 *Jac.* 1. it was held that where a Man dies, leaving a Wife, and no Children, that the Wife being intitled to one Moiety of his Perſonal Eſtate, the other Moiety ſhall be diſtributed equally between his Mother and Brothers and Siſters; and yet the Caſe of leaving a Wife is not mentioned in that Statute.

The Court were all clear of Opinion, that this was an Advancement by the Father in his Life-time within the Meaning of the Statute, though contingent and future, ſo that ſhe could not have that and her diſtributory Share likewiſe; and the Maſter of the *Rolls* ſaid, that the Civil Law made no Difference between a Real and Perſonal Eſtate, but only moveable and immoveable; and the Words of the Act, which ſpeak of a Proviſion made by the Father in his Life-time, are very proper to diſtinguiſh between that and a Proviſion made by his Will; and cited the Writ *De rationabili parte bonorum*, and *Swinb.* 200. to prove that a future Proviſion will exclude the Heir or any other of the Children; and cited *Pawlett* and *Pawlett*, 2 *Vent.* 1 *Vern.* 321, and the Chief Juſtice ſaid, ſuppoſe the Father had left but 2000 *l.* Perſonal Eſtate, it would be extreamly hard, that the eldeſt Daughter ſhould have her 5000 *l.* and a Share of the 2000 *l.* too.

And *per* Lord Chancellor, the Caſe of *Feaſt* and *Feaſt* is not to be cited in this Caſe, that being a Cauſe by Conſent, and the Queſtion very little conſidered; and he ſaid, he thought any Settle-

ment in or out of Lands, either by Annuity, Rent or Portion, would be a Proviſion within the Statute; and that ſuch Proviſion might be valued and brought into the *Collatio bonorum*, if they think it worth their While, that the 5000 *l.* whether called contingent, or not, is an Intereſt, and ſuch a one as would happen within a reaſonable Time, *viz.* ſix or ſeven Years after the Father's Death, and there was then no Son; and it was ſuch an Intereſt as was valuable.

That the Diſtribution muſt be made as the Eſtate ſtands at the Father's Death, and the Parties are to give Bond to refund, if Debts afterwards appear; and future Debts due to the Inteſtate muſt be diſtributed as they can be got in; that here the Contingency has happened, and ſhe is now at Liberty to ſay, whether ſhe will ſtick to that Proviſion, or bring into the Computation of *Collatio Bonorum*, in order to have an equal Share with the Reſt. But as to the 80 *l. per Annum* Maintenance, that is not to be brought in, being only for the Education and Maintenance of the Daughter, which the Parents were beſt Judges of; and accordingly the Decree was pronounced. *Mich.* 1727. between *Edwards* and *Freeman*, *per* Lord Chancellor aſſiſted with *Raymond* Chief Juſtice, the Maſter of the *Rolls*, and *Price* and *Forteſcue*, Juſtices.

CAP.

# CAP. XXX.

# Fines and Recoveries.

(A) What Eſtate or Intereſt may be barred or transferred by Fine or Recovery.

(B) What Charges and Incumbrances on Lands are barred and deſtroyed by Fine and Recovery.

(C) What Charges and Incumbrances are made good by Fine and Recovery.

(D) Where Equity will ſupply a Defect in a Fine or Recovery.

(E) Fines and Recoveries, in what Caſes vacated or ſet aſide in Equity.

## (A) What Eſtate or Intereſt may be barred or transferred by Fine or Recovery.

1. IF *Ceſtui que Truſt* in Tail levies a Fine, or ſuffers a Recovery, ſuch Fine and Recovery ſhall have the ſame Operation, as if it were an Eſtate at Law, eſpecially if it be on a Conſideration paid. *Paſch.* 16 *Car.* 2. between *Goodrick* and *Brown.* 1 *Chan. Ca.* 49. 1 *Chan. Ca.* 213. *S. C.* cited, and ſaid to be the firſt Precedent of the Kind. 1 *Chan. Ca.* 68. *S. P.* where it is ſaid to be *Bridgman*'s Opinion, that it ſhould not Bar; but it is now well ſettled; for,

2. If *A.* conveys his Eſtate to Truſtees, in Truſt that they ſhall convey to ſuch Perſons and for ſuch Eſtates, as he ſhall by Will Direct; and then by Will directs, that the Truſtees ſhall convey to *B.* his Son in Tail Male, Remainder to *C.* in Tail Male, Remainder to the right Heirs of the Teſtator, and *B.* being in Poſſeſſion, ſuffers a Recovery without the Truſtees; this ſhall bar the Eſtate Tail

Tail in Equity, for a Truſt is a Creature of Chancery, and to be governed by the Rules of Equity, and not by the Niceties of the Law. *Mich.* 1688. between Sir *Francis North* and *Way*. 1 *Vern.* 13. 2 *Chan. Ca.* 78. *S. C.* a Truſt Eſtate in Tail is not within the Statute *de donis*, and therefore may be barred by Fine or Recovery. 2 *Vent.* 350. 2 *Chan. Ca.* 71. *S. P.* 2 *Vern.* 132. *S. P.* 1 *Vern.* 440. *S. P.* decreed between *Waſhborn* and *Downes*, 1686. where it is ſaid, that it has not been doubted ſince Lord *Bridgman*'s Time, but that a Fine and Recovery will bar as at Law.

3. If *A.* be *Ceſtui que Truſt* for Life, Remainder in Truſt for *B.* in Tail, Remainder in Fee to *C. B.* cannot, by ſuffering a Recovery, bar the Remainder, if there be no good Tenant to the Precipe. 2 *Chan. Ca.* 64. between Lord *North* C. J. and *Champernoon*; *per* Lord Chancellor. 1 *Vern.* 13. *S. C.* but *S. P.* does not appear.

4. If *Ceſtui que Truſt* in Tail with Remainder over, levies a Fine, and dies without Iſſue, and five Years paſs, and Non-claim; *per* Lord *Keeper*; this ſhall bar the Remainder; between *Basket* and *Peirce*, 1 *Vern.* 226. but if there be an Entry or Claim, *quære* whether the Remainder is barred. *Vide* 2 *Chan. Ca.* 64. *And* vid. *how Truſt Eſtates are barred or conveyed, and what ſhall be a Breach of Truſt in the Truſtees*, Title *Truſt*.

5. If a Truſtee ſells the Land to a Stranger, that has no Notice of the Truſt, and a Fine with Proclamations and five Years paſs; and afterwards the Truſtee, for Valuable Conſideration really paid, purchaſes theſe Lands again from the Vendee; *per* Lord Chancellor and Chief Juſtice *North*, the Truſtee ſhall ſtand ſeiſed as at firſt, as if there had not been any Fine levied. *Mich.* 34 *Car.* 2. 1 *Vern.* 60. between *Bovey* and *Smith*, 2 *Chan. Ca.* 124. *S. C.*

6. *A.* ſeiſed in Fee, in Truſt for *B.* for full Conſideration conveys to *C.* the Purchaſer, having Notice of the Truſt, and afterwards *C.* to ſtrengthen his own Eſtate, levies a Fine; *B.* the *Ceſtui que Truſt*, in that Caſe, ſhall not be bound to enter within the fifth Year. A Caſe put by my Lord *Chancellor*, and agreed to by the Counſel; for *C.* having purchaſed with Notice, notwithſtanding any Conſideration paid by him, is but a Truſtee for *B.* and ſo the Eſtate not being diſplaced, the Fine cannot Bar. 1 *Vern.* 149.

## (B) What Charges and Incumbrances on Lands are barred and deſtroyed by Fine and Recovery.

1. IF *T. S.* ſeiſed in Fee, deviſes to his Children and others, ſeveral Sums of Money, to be paid at diſtinct Times, by 50 *l. per Annum*, out of Lands; and one Payment of 50 *l.* incurs due, and then the Lands are aliened by Fine, and five Years and Non-claim paſs, the Deviſees are barred by the Fine of theſe Sums, which grew due after the Levying of it, but not of the 50 *l.* which became due before; for a Truſt is barred by a Fine. Between *Wakelin* and *Warner*, *Hill.* 31 *Car.* 2. 2 *Chan. Ca.* 247. *Quære* of this Caſe, for,

2. If *J. S.* deviſes Lands to *B.* in Tail, Remainder to *C.* in Tail, ſubject to the Payment of Legacies; and *C.* levies a Fine, and five Years and Non-claim paſs, and *C.* grants a Rent-charge to *A.* and mortgages to *B.* yet the Legacies are not barred by the Fine, and Non-claim; for *C.* having no Title but under the Will, the Purchaſers muſt be preſumed to have Notice of the Legacies, and the Contents thereof. *Trin.* 1710. between the *Drapers Company* and *Yardley*, 2 *Vern.* 662.

3. To a Bill to redeem a Mortgage, the Defendant pleaded a Fine with Proclamations of Non-claim for five Years; but the Plea was over-ruled, the Mortgagee having a Right to retain the Land, till his Money was paid; and this was a new Way of foreclоſing a Man of his Equity of Redemption. *Hill.* 1682. between *Welden* and the Duke of *York*, 1 *Vern.* 132. but *vide* 2 *Vern.* 189. where it is held, that a Fine and Non-claim ſhall be a Bar to an Equity of Redemption; and there ſaid, that it had been ſo ruled by my Lord Chief Juſtice *Hale*, in Sir *Nicholas Stourton*'s Caſe.

4. A Fine and Non-claim is a good Bar to a Bill of Review, *per* Lord Commiſſioner *Hutchins*. *Mich.* 1690. between *Lingard* and *Griffin*, 2 *Vern.* 189, 190. *Q.*

## (C) What Charges and Incumbrances are made good by Fine and Recovery.

1. IF Tenant in Tail confeſſes a Judgment, or mortgages the Lands, and afterwards ſuffers a Recovery to a collateral Purpoſe, that Recovery ſhall enure to make good all his precedent Acts and Incumbrances. 1 *Chan. Ca.* 720. But if a Fine is levied for a particular Purpoſe, purſuant to a Decree, Equity will not permit any other Uſe to be made of that Fine. 1 *Chan. Ca.* 49. 2 *Vern.* 56. *S. P. arguendo.*

2. *A.* deviſed to *B.* the Father for Life, Remainder to *C.* his Son an Infant in Fee, and deviſed 400 *l.* to the Son to be paid at Twenty-one, and made the Father Executor, and left 2000 *l.* Perſonal Aſſets; and *B.* having ſpent the Perſonal Aſſets, mortgaged the Lands to *J. S.* and made Affidavit, that they were free from Incumbrances, and that he was ſeiſed in Fee, and levied a Fine for corroborating the Mortgage, and alſo declared the Uſe thereof to him and his Heirs; the Son having entred for a Forfeiture, the Mortgagee brought his Bill to be relieved; and the Court decreed, that the Mortgagee, notwithſtanding the Forfeiture, ſhould hold and enjoy the Lands againſt the Son, during the Life of the Father. *Hill.* 1699. between *Willis* and *Finex.*

## (D) Where Equity will ſupply a Defect in a Fine.

1. IF *Ceſtui que Truſt* in Tail, being in Poſſeſſion under the Truſtee, who had the Freehold in him, ſuffers a Recovery, in which he himſelf is Tenant, and ſo no good Tenant to the *Precipe*; yet this ſhall bar the Remainder in Fee of the Truſt. 2 *Chan. Ca.* 63. But it ſeems, that if Tenant in Tail, covenants to levy a Fine, and he dies before it is executed, tho' the Fine has proceeded to a Caption, yet Equity will not make it good, altho' for valuable Conſideration. *Vide* 2 *Vern.* 5.

2. *A.* has two Sons, *B.* and *C. A.* on the Marriage of *B.* covenants, before the End of *Eaſter* Term then following, to levy a Fine to the Uſe of *B.* and the Heirs of his Body, Remainder to the Uſe, of *C.* and the Heirs of his Body, Remainder to *A.* in Tail, Remainder to him in Fee; the Fine was levied as of *Eaſter* Term, but the Marriage being put off till after *Eaſter* Term, the Deed was not dated till after neither; ſo the Fine was levied before the Date of the Deed, and by Conſequence the Deed was no Declaration of the Uſes of that Fine; the Father died, and then *B.* died, leaving Iſſue *W.* and *W.* having borrowed ſome Money of *J. S.* mortgages the Lands to him, and dies without Iſſue. *C.* claiming under the Settlement, brings his Bill to have it eſtabliſhed, and that the Defect before-mentioned may be ſupplied; but in Regard the Conſideration of *B.*'s Marriage did not extend to him, the Court refuſed him any Relief. *Mich.* 1703. between *Staplehill* and *Bully*.

## (E) Fines and Recoveries, in what Caſes vacated or ſet aſide in Equity.

1. *A.* Having prevailed, by the Means of an Attorney, with a Woman to levy a Fine of ſome Houſes, and to execute a Deed, leading the Uſes thereof to him and his Heirs; and it being proved, that ſhe, at the Time of levying the Fine, declared, that ſhe muſt make Uſe of ſome Friend's Name in Truſt; and afterwards by Will declaring, that ſhe only levied ſuch Fine in Truſt, the better to diſpoſe of her Eſtate; and having deviſed it to *J. S.* ſubject to the Payment of her Debts; the Court decreed not only the Eſtate liable to the Debts, but alſo a Conveyance to *J. S.* the Deviſee. *Mich.* 1693. between *Woodhouſe* and *Brayfield*, 2 *Vern.* 307.

2. If Lands are deviſed to Truſtees, till Debts paid, and then to an Infant and his Heirs, and *J. S.* a Stranger enters on the Lands, and levies a Fine, and five Years and Non-claim paſs; and the Infant when of Age, brings an Ejectment, but is barred, becauſe the Truſtees ought to have entred; yet Equity will relieve, and not ſuffer an Infant to be barred by the Laches of his Truſtees, nor to be barred of a Truſt Eſtate, during his Infancy; and the Infant in this Caſe ſhall recover the mean Profits. *Mich.* 1699. between *Allen* and *Sayer*, 2 *Vern.* 368.

3. *A.* having inveigled his Wife to levy a Fine of her Land to him, when ſhe lay upon her Death-bed, pretending, as was ſuggeſted,

he was to have it only for his Life; and a *Dedimus* was ſent into the Country to take the Fine, and the Caption was taken about 100 Miles from *London*, the very Day ſhe died; and becauſe the Fine would not have ſtood, the Party being dead before the King's Silver was paid, the Writ of Covenant was raſed in the Teſte, and made to bear Date ten Days backwards; and all other Parts of the Fine were raſed likewiſe, and made to correſpond with it; and the King's Silver was paid, and ſo all appeared on the Record to have been done before the Death of the Woman. On a Bill brought to have the Fine ſet aſide, or to have a Reconveyance, it was held by the Court, that though Chancery has a Power to relieve, as much againſt a Fine obtained by Fraud or Practice, as any other Kind of Conveyance; yet that ſuch Relief was not by decreeing a Vacate of the Fine, but by ordering a Re-conveyance; but that for any Error in the Fine, or Irregularity, or ill Practice in the Commiſſioners, it was a Matter properly cogniſable in that Court where the Fine was levied, and for which that Court may (*a*) vacate the Fine; and there being no Proof of Fraud or Practice in this Caſe, the Bill was diſmiſſed. *Hill.* 1700. between *St. John* and *Turner*.

(*a*) Husband and Wife, the Wife being but ſixteen Years old, levied a Fine, and they being brought into the Court of Common Pleas by Complaint of the Remainder-Man, a Vacate was entered of the Fine, *quoad* the Woman, and an Information ordered to be exhibited againſt the Commiſſioners. *Hutchinſon*'s Caſe, 3 *Lev.* 36. *vide* 2 *Vent.* 30. where a Wife being an Infant levied a Fine, and ſhe being dead, it could not be ſet aſide; but the Court held, that they might fine the Commiſſioners, being in the Nature of Attornies, and liable to the Cenſure of the Court; but the Wife being Twenty, and therefore not to be known by Inſpection, it is an Excuſe; by two Judges againſt two.

CAP.

# CAP. XXXI.

## Guardian.

(A) Of the Appointing and Removing of a Guardian.

(B) What Acts of his, with Reſpect to the Infant's Eſtate, ſhall be good.

(C) How to be charged, and how to account.

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## (A) Of the Appointing and Removing of a Guardian.

1. IF the Father of an Infant is indebted to *J. S.* and the Father by Deed grants him the Guardianſhip of his Children, with a Covenant not to revoke it, and gives a Penal Bond for Performance; and a Bill is brought to bring the Guardian to an Account, and to remove him; tho' the Guardian is willing to do as the Court ſhall direct; yet in Regard there is a juſt Debt due, the Court will not reſtrain him from receiving the Rents and Profits, only from abuſing his Perſon. *Hill.* 1686. between *Lecome* and *Shiers*, 1 *Vern.* 442.

2. If a Perſon appointed Guardian purſuant to the Statute (*a*) 12 *Car.* 2. dies, or refuſes to take upon himſelf the Guardianſhip, my Lord Chancellor may appoint a Guardian; but a Guardian cannot be otherwiſe appointed, than by bringing the Infant into Court, or his Praying a Commiſſion to have a Guardian aſſigned him. *Hill.* 1699. between *Loyd* and *Carew.*

(*a*) 12 *Car.* 2. a Father under Age, or of full Age, by Deed in his Life-time or by Will, in Preſence of two Witneſſes, may diſpoſe of the Cuſtody of his Child under twenty-one Years of Age, and not married at the Time of his Death; whether then born, or *in ventre ſa mare*, during his Nonage, to any in Poſſeſſion or Remainder, other than Popiſh Recuſants; which Perſons may maintain any Action of Treſpaſs, againſt wrongful Takers away, or Retainers of ſuch Child, and recover Damages for the Child's Uſe, and may take into their Cuſtody, his Lands, Perſonal Eſtate, &c. according to ſuch Diſpoſition, and bring Actions as Guardians in Socage might do. This Act ſhall not prejudice the Cuſtom of *London*, nor any other City or Town Corporate, &c.

3. *A.* deviſed the Guardianſhip of his Son, who was ſeven Years of Age, to his Wife, who was Mother-in-Law to the Infant; and ſhe marrying meanly with her own Servant, the Uncle gets Poſſeſſion

of the Infant, and ſends him to be educated in a Proteſtant College in *France*; and upon a *Homine Replegiando*, it was held by my Lord Chancellor, that tho' in Caſe of a Guardian by (*b*) Common Law, this Court may remove him; yet here being a Guardian according to the Statute, ſhe could not be removed, but that he would make her give Security not to marry the Infant *inter Annos Nubiles*, and the Uncle was ordered to ſend for the Boy. 29 *Car.* 2. between *Foſter* and *Denny*, 2 *Chan. Ca.* 237.

(*b*) Guardians at Common Law may be removed, or compelled to give Security, if there

appears any Danger of their Abuſing either the Infant's Perſon or Eſtate; and there are ſeveral Inſtances of this Kind, as *Stile* 456. *Hard.* 96. 3 *Chan. Rep.* 58. 1 *Sid.* 424. 3 *Salk.* 177. but there are none where a Statute Guardian has been totally removed. Some, where ſuch Terms have been impoſed on the Guardian, as effectually to prevent his doing any Thing to the Prejudice of the Infant; but *quære*, whether ſuch Cauſes may not ariſe, for which he may be totally removed, notwithſtanding the Statute; as if he becomes Mad, Lunatick, &c. A Guardianſhip is not aſſignable; neither ſhall it go to the Executors or Adminiſtrators, being a Perſonal Truſt. *Vaugh.* 180.

4. (*c*) The Court of Chancery may aſſign one of the Six Clerks to be Guardian to an Infant. 2 *Chan. Ca.* 163. *Nel. Chan. Rep.* 8*vo.* 44. *S. P.*

(*c*) The Spiritual Court may appoint a Guardian to an Infant

till he is fourteen Years old, who has only a Perſonal Eſtate; but if there be both a Real and Perſonal Eſtate, ſuch Appointment is void. *Vide* 2 *Lev.* 162, 217.

## (B) What Acts of his, with Reſpect to the Infant's Eſtate, ſhall be good.

1. THE Plaintiff's Father mortgages to *J. S.* and dies, leaving the Plaintiff and *C.* Heir at Law, both Infants; Defendant as Guardian enters on the Lands, and with the Profits paid of the Mortgage, and took an Aſſignment to other Perſons; the Defendant having married his Daughter to *C.* who died without Iſſue; it was inſiſted for the Defendant that he paid off the Mortgage with his own Money, and that he had not enough of the Infants; and that if he had, he could not juſtify Diſpoſing of it in ſuch Manner (by which it would prevent its coming to the Adminiſtrator;) but it being proved that he called in Part of the Infants Rents for that Purpoſe; and becauſe it was moſt for the Infants Advantage to pay off the Mortgage, it was ſent to an Account: And if the Profits received were ſufficient to pay it, the Defendant was to convey; but if they fell ſhort, the Plaintiff was to lay down as much as, with what the Defendant laid down, would make it up. *Hill.* 22 *Car.* 2. between (*a*) *Bridget Dennis*, by Sir *Alexander Frazier* her *Committee*, and Sir *Thomas Badd*, 1 *Chan. Ca.* 156. *vid.* 2 *Chan. Ca.* 197. where my Lord *Keeper* was of Opinion, that a Guardian ſhould pay off a Judgment by the Profits of the Eſtate.

(*a*) 1 *Vern.* 436. *S. C.* cited, and agreed to by my Lord Chancellor, ſo he did the

becauſe the Money would in Equity be liable in his Hands to diſcharge the Mortgage; Adminiſtrator no Wrong.

2. An Eſtate having deſcended to an Infant, ſubject to Incumbrances; and the Queſtion being, whether a Guardian might, without the Direction of a Court of Equity, apply the Profits to diſcharge the Incumbrances, or the Intereſt of them, or whether they ſhould not be accounted Perſonal Eſtate; and ſo the Adminiſtrator of the Infant be intitled to them, if the Infant died in his Minority; it was held by the Court, that a Guardian, without any Di-

rection, may pay the Intereſt of any Real Incumbrance, and the Principal of a Mortgage; becauſe that is a direct and immediate Charge on the Land, but not any other Real Incumbrance. *Hill.* 1700 between *Palmer* and *Danby*.

3. But where a Widow, who was Guardian to her Son, received the Rents and Profits of his Eſtate, and paid off Debts by Specialty, but took Aſſignments of the Bonds; the Son dying in his Minority, ſhe brought her Bill againſt the Defendant the Heir, for a Diſcovery of Aſſets by Diſcent, to ſatisfy the Money due by Bond, ſhe claiming the Profits as Adminiſtratrix to her Son; and it was held by the Court, that the Guardian was not compellable to apply the Profits of the Eſtate of the Infant Heir, to pay off the Bond-Debts. *Hill.* 1707. between *Waters* and *Ebral*, 2 *Vern.* 606.

4. A Guardian to an Infant, having a conſiderable Sum of Money in his Hands, that was raiſed out of the Infant's Eſtate, lays out, with the Conſent of his Grandmother, 3000 *l.* in a Purchaſe of Lands, which lay contiguous to the Infant's Eſtate; and takes the Purchaſe in the Name of *J. S.* for his Benefit, if when he came of Age, he ſhould agree thereto, and allow that Money on Account. The Infant dying in his Minority, it was held by my Lord *Chancellor*, Chief Baron *Atkins*, and Mr. Juſtice *Lutwich*, againſt the Opinion of the Maſter of the *Rolls*, that tho' neither the Heir nor Adminiſtrator of the Infant were entitled to the Lands, yet the Guardian muſt account for this 3000 *l.* to the Adminiſtrator of the Infant; and that it was not in the Power of the Guardian, without the Direction of this Court, to turn the Perſonal into Real Eſtate, by which it would deſcend to the Heir; and that the Objection, that an Infant may make a Will at Seventeen of his Perſonal Eſtate, but not of his Real, was not anſwered. Between the Earl of *Winchelſea* and *Norcliff*, 1 *Vern.* 403, 435. *S. C.*

5. If a Guardian borrows Money of *A.* to pay off an Incumbrance on the Infant's Eſtate, and promiſes to give *A.* Security for his Money, but dies before it is done; though *A.*'s Money is applied to pay off the Incumbrance, yet the Court will not decree him Satisfaction out of the Infant's Eſtate; but if the Sum diſburſed exceeds the Profits of the Eſtate, for ſo much, *A.* ſhall have an Account as Money due to the Guardian, and it ſhall be raiſed out of the Infant's Eſtate. *Hill.* 1704. between *Hooper* and *Eyles*, 2 *Vern.* 480.

## (C) Guardian, how to be charged, and how to Account.

1. IF a Guardian takes a Bond for the Arrears of Rent, he thereby makes it his own Debt, and ſhall be (*a*) charged with it. 26 *Car.* 2. *Wale* and *Buckley*, 2 *Chan. Rep.* 97.

(*a*) A Guardian on his Account ſhall have Allowance of all reaſonable Expences; and if he is robbed of the Rents and Profits of the Land, without his Default or Negligence, he ſhall be diſcharged thereof, upon his Account. 1 *Inſt.* 89. *a.*

2. If a Guardian to an Infant, whoſe Lands are incumbred, to the Value of 600 *l.* buys it off with 100 *l.* of the Infant's Money, he ſhall not charge the Infant with the 600 *l.* 2 *Chan. Ca.* 245.

3. If a Guardian to an Infant takes an Aſſignment of the Mortgage, altho' the Mortgagee never entred; yet *per* Lord Keeper *Wright*, as to the Profits received out of the Mortgaged Lands, the Guardian ſhall be taken to be in Poſſeſſion as Mortgagee, and not as Guardian; but the Reporter adds a *Q.* 2 *Vern.* 471.

CAP.

# CAP. XXXII.

# Heir and Ancestor.

(A) By what Acts of the Ancestor shall the Heir General be bound.

(B) By what Acts shall an Heir Special, or Issue in Tail, be bound.

(C) Heir, in what Cases favoured in Equity.

(D) Where Charges and Incumbrances on the Lands shall be raised, or shall sink in the Inheritance, for the Benefit of the Heir.

(E) Where the Heir shall have the Benefit and Aid of the Personal Estate.

(F) In what Cases there shall be a resulting Trust for the Benefit of the Heir.

(G) What Things shall go to the Heir, and not to the Executor.

(H) What shall be Assets by Descent in the Hands of the Heir.

(I) Unreasonable Bargains and Securities obtained from young Heirs, in what Cases to be set aside.

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## (A) By what Acts of the Ancestor shall the Heir General be bound.

1. IF Lands are devised to the Wife for Life, and afterwards to be sold by the Executor for younger Children's Portions, and the Executor and Wife die; the Children may compel the Heir to sell, tho' the Executor had only an (*a*) Authority: Ruled upon Demurrer. *Mich.* 15 *Car.* 2. between *Garfoot* and *Garfoot*, 1 *Chan. Ca.* 35.

(*a*) By the Common Law, if Lands are devised to be sold by an Executor, by which he has only an Authority, and he dies, no Sale can be made; so if an Authority only be given to two, and one dies, the Survivor cannot sell; but it is otherwise when an Authority is given them, coupled with an Interest, as by a Devise of Lands to them to be sold. 1 *Inst.* 112, 113, 181.



2. If

2. If *J. S.* deviſes his Lands to his Executors, to ſell and pay Debts, the Heir ſhall be compelled to join in the Sale; *per* Lord *Keeper*, who ſaid it had been ſo ruled in the Houſe of Lords. *Trin.* 27 *Car.* 2. between *Fowle* and *Green*, 1 *Chan. Ca.* 262.

3. If Lands are ſettled on Truſtees for raiſing of Maintenance and Portions for Daughters, and a Bill is brought for a Sale, and that the Heir might join; he ſhall be compelled to join, tho' it is objected that he has no legal Eſtate in him. *Paſch.* 1689. between *Roll* and *Roll*, 2 *Vern.* 99. where it is ſaid, that ſeveral Caſes to that Purpoſe were cited; *vide* the Caſe of *Pit* and *Pelham*, 1 *Chan. Ca.* 176. ſeveral Precedents quoted, where the Lands were decreed to be ſold, though no Executor named, or though he died before any Sale made. And *vide* 2 *Vern.* 420. where it is reſolved, that the Heir may have the Lands ſold, if it appears for his Advantage, as well as the younger Children may inſiſt upon a Sale.

4. If *A.* contracts to ſell Lands, and receives good Part of the Purchaſe-money, but dies before a Conveyance is executed, and a Bill is brought againſt the Heir, he ſhall (*b*) convey, and the Money ſhall go to the Executor; eſpecially if there are more Debts due than the Teſtator's Perſonal Eſtate is ſufficient to pay. *Mich.* 1692. decreed between *Hoskins* and *Savoy*, *S. P.* 2 *Vern.* 215. between *Baden* and Counteſs of *Pembroke*.

(*b*) If a Man for 100*l.* aſſumes to make a Leaſe for 21 Years, and dies; his Heir is not compellable, in a Court of Equity, to make the Leaſe; for this is againſt the Common Law. 3 *Jac.* 1. between *Chapman* and *Boier*, 1 *Roll. Abr.* 377, 378. *Quære.*

## (B) By what Acts ſhall an Heir Special or Iſſue in Tail be bound.

1. IF Tenant in Tail bargains and ſells the Lands, yet this cannot be made good in Equity againſt the Statute, by which he is diſabled to bar his Iſſue; reſolved *per* Lord *Keeper* and Lord *Hobart*, between *Cavendiſh* and *Worſly*, *Hob.* 203.

2. But if Tenant in Tail agrees to convey, he may be compelled in Equity to execute the Agreement; but if he dies, his Iſſue is not bound thereby, unleſs he doth ſome Act whereby he conſents to, and confirms the Agreement. *Trin.* 22 *Car.* 2. between *Roſs* and *Roſs*, 1 *Chan. Ca.* 171. 1 *Lev.* 239. *S. P. in Cancellaria.*

3. If Tenant in Tail agrees to ſell his Lands, and receives Part of the Conſideration-Money, and upon his not making good the Sale by a Fine or Recovery, a Bill is brought to compel him thereto; and a Decree pronounced accordingly; and he ſtands out all Proceſs againſt him to a Contempt, and then dies without perfecting the Sale; yet his Iſſue ſhall not be compelled to perfect it: Adjudged on a Bill brought againſt the Iſſue to revive the Decree. *Hill.* 1708. between *Powel* and *Powel*, *S. C.* cited, and admitted by my Lord Chief Baron *Gilbert*, in the Argument of the Earl of *Coventry*'s Caſe, *Paſch.* 1724. for the Heir comes in under the Statute *de donis* ſingly; and is not any Way deriving from the Anceſtor who contracted.

4. If Tenant in Tail ſells at a full Value, and receives the Conſideration-Money, and covenants to levy a Fine, and is decreed to do it; yet dying (tho' in Priſon and in Contempt for not performing the Decree) the Iſſue in Tail cannot be bound by it. Between *Weal* and *Lower*, 2 *Vern.* 306.

## (C) Heir, in what Caſes (*a*) favoured in Equity.

(*a*) *Vide* Title *Deviſe*, That an Heir ſhall not be diſinherited by doubtful or ambiguous Words.

1. IF *J. S.* deviſes Lands to his Wife for Life, and the Heir claims the Lands by an Intail, and prays a Diſcovery of the Writings, which by Order are brought into Court, and on a Motion *ex parte* given to the Heir, and among them the Deed of Intail is found; and the Wife inſiſts on having back the Deed, unleſs the Heir would confirm her Eſtate, and that ſhe is more than a bare Volunteer, it being a Proviſion for her; yet it not appearing to be purſuant to Marriage-Articles, it ſhall be conſidered only as a Bounty; and the Heir having a good Title ſhall be aided. *Mich.* 32 *Car.* 2. 2 *Chan. Ca.* 4.

2. If Husband and Wife levy a Fine of the Wife's Lands, and by the Deed the Uſe is declared to the Husband and his Heirs, and the Husband, without any Conſideration deviſes it to *J. S.* *J. S.* being a voluntary Deviſee ſhall have no Aid in Equity for the Deed againſt the Heir of the Mother, but will be left to help himſelf at Law as he can. *Hill.* 34 *Car.* 2. 2 *Chan. Ca.* 134.

3. If *J. S.* by Will deviſes 3000 *l.* to his three younger Children, which Sum was a Mortgage due from *J. T.* and by his Will adds, that for the more ſure Payment of it, that in Caſe his Son and Heir, whom he appointed Executor, ſhould not pay the ſame according to his Will, then he deviſed the Land for the Payment thereof, and appoints it to be paid them at twenty-one, or Marriage, which ſhould firſt happen, and a Maintenance out of his Land in the mean Time, and *J. T.* obtains a Decree for Redemption of his Mortgage, on Payment of the Money, againſt the Executor and the Infants, who appeared by their Mother as Guardian; and the Money is brought into Court, and placed out by the Maſter, on a Security which proves ill; yet the Heir ſhall not be compelled to pay it over again to the younger Children; for the Lands are made only ſupplementally chargeable in Caſe *J. T.* had failed, or in Caſe the Heir and Executor had received, and refuſed, to pay it to the Children; and though a Real Security for Childrens Portions ſhall not be changed into a Perſonal one; yet in this Caſe it was not in the Power of the Heir to prevent *J. T.*'s redeeming the Mortgage. *Mich.* 1685. between *Oldfield* and *Oldfield*, 1 *Vern.* 336.

4. If an Eſtate is limited to Truſtees for Payment of Debts and Legacies, and the Truſtees raiſe the whole Money, but do not apply it according to the Truſt; yet the Heir ſhall have the Lands diſcharged, and the Legatees muſt take their Remedy againſt the Truſtees, for the Money being once raiſed, the Land ſhall be diſcharged. 1 *Salk.* 155. *in Domo Procerum.*

5. But if *A.* being Tenant for Life, Remainder to his firſt Son in Tail, Remainder over, has a Power to charge the Eſtate with 250*l.* *per Ann.* Annuity, for any Term not exceeding four Years, and *A.* does by Deed charge the Premiſſes with 250*l.* *per Ann.* for four Years, to commence from his Death, in Truſt to raiſe 1000*l.* Part to be paid to *B.* and the other Part to *C.* the Son pays *B.* what was due to him, and he delivers up the Deeds, and they are ſuppreſſed, and the Son takes the Profits for four Years, and more, and leaves a Daughter his Heir at Law, and leaves no Perſonal Aſſets; the Lands ſhall be liable in the Hands of the Daughter to pay *C.* with Intereſt, though the Term for Years is expired, and the Perſon dead who received the Profits. *Mich.* 1690. between *Smith* and *Smith*, 2 *Vern.* 178.

## (D) Where Charges and Incumbrances on the Land ſhall be raiſed, or ſhall ſink in the Inheritance for the Benefit of the Heir.

1. *J. S.* by Settlement charged his Lands with the Payment of 4000*l.* a-piece to his two Daughters, to be paid them at their reſpective Ages of twenty-one Years, or Days of Marriage, and reſerved to himſelf a Power of otherwiſe ordering it by his Will; and by his Will made within a Day after, he confirms their Portions, and that they ſhall be paid as mentioned in the Settlement; one of the Daughters dies before twenty-one, and unmarried, and her Mother ſued for the Portion as Adminiſtratrix to the Daughter; but it was held, that this Portion ſhould not be raiſed, but ſhould ſink in the Inheritance for the Benefit of the Heir at Law; tho' it was admitted, that if it had been a Sum of Money deviſed, and the Legatee had died before the Time of Payment, it would have gone to the Adminiſtrator; but here the Settlement is operative, and the Wife is a Jointreſs otherwiſe provided for. *Paſch.* 1 *Jac.* 2. between *Pawlet* and *Pawlet*, 2 *Vent.* 366, 367. 1 *Vern.* 204, & 324. *S. C.* where a Note is added, that it was affirmed in the Houſe of Peers. *S. P.* admitted in the Caſe of *Edwards* and *Freeman*, *Mich.* 1727. and *S. C.* cited.

2. If a Term is created by a Marriage-Settlement, to raiſe 3000*l.* for Daughters Portions within twelve Months after the Death of the Survivor of the Husband and Wife; and there being but one Daughter, the Father by Will deviſes the Truſt Lands to make good his Wife's Jointure, and to raiſe 3000*l.* for his Daughter's Portion; the Daughter dies at the Age of five Years, the Portion being to be raiſed out of Land; as ſhe could have no Occaſion for it at that Age, it ſhall not be raiſed for the Benefit of her Adminiſtrator. *Paſch.* 1702. between *Breuen* and *Breuen*, 2 *Vern.* 439. *Note; The Daughter died within the Year, but it does not ſo appear by this Report.*

3. Upon a Marriage-Settlement a Term was created for raiſing Portions for younger Children, *viz.* 1000*l.* to the Eldeſt of the younger Sons, and 500*l.* to every other younger Son, and ſo for the Daughters, to be paid at ſuch Time as the Truſtees in their Diſcretion ſhould appoint; the Father leaves two Sons and two Daugh-

Daughters; the youngeſt Son, before any Appointment made by the Truſtees, dies at ſeventeen, being then an Apprentice; and it was held, that though there was no Time limited for the Raiſing of it, by which it was urged to be an Intereſt veſted; yet as he died before he could have any Occaſion for it, and before any Appointment by the Truſtees, that it ſhould ſink in the Inheritance, and not go to his Siſters, who had taken out Adminiſtration to him. *Hill.* 1702. between *Warr* and *Warr.*

4. If one deviſes 1000 *l.* to his Daughter for her Portion, charged upon a Real Eſtate, and payable at twenty-one, and the Daughter dies before twenty-one, the Portion ſhall ſink in the Land; but it is otherwiſe if no Time had been limited for the Payment of the Portion; for in that Caſe it goes to the Executors of the Daughter; and there is no Difference where the Portion is ſecured by a Settlement or Will, if ſecured out of a Real Eſtate, and the Party die before it is payable; for in either Caſe it ſinks in the Lands. *Mich.* 1688. between *Smith* and *Smith*, 2 *Vern.* 92. *vide* 2 *Vern.* 416. *S.P.* reſolved, and there ſaid, that there was no Difference where the Land was charged by Will, and where by a Settlement.

5. So where one by Will charged his Lands with 6000 *l.* for the Child with which his Wife was *privement enſeint*, if it proved a Daughter, with a Clauſe of Entry for Non-payment; a Daughter is born, who dies; and it was decreed that the 6000 *l.* ſhould not be raiſed for the Benefit of her Adminiſtrator. *Hill.* 1690. between *Norfolk* and *Gifford*, 2 *Vern.* 208.

6. But where Lands are deviſed to be ſold for Payment of Portions to younger Children, and one of the Children dies after the Portion becomes payable, though before the Land ſold, yet his Adminiſtrator ſhall have it, being an Intereſt veſted. *Mich.* 1684. between *Bartholomew* and *Meredith*, 1 *Vern.* 276. *vide* 2 *Vern.* 508. where a Portion to be paid purſuant to a Marriage-Settlement, was held an Intereſt veſted, being made to carry Intereſt, though the Party died before it became payable.

7. So where on a Marriage-Settlement Lands are limited to the Husband for Life, Remainder to the Wife for Life, Remainder to the firſt, *&c.* Sons of the Marriage in Tail Male, Remainder to *J. S.* in Fee; provided, if there be no Iſſue Male of the Marriage, and there be one or more Daughter's living at the Husband's Death, then the Truſtees to ſtand ſeiſed, ſubject to the Jointure, to the Intent ſuch Daughter or Daughters ſhould receive out of the Rents 10000 *l.* and 100 *l. per Ann.* Maintenance; but no Time limited for the Payment of the Portions; the Husband dies, leaving only one Daughter, who lives to ſeventeen, and by Will diſpoſes of the 10000 *l.* and it was decreed, that this was a veſted Intereſt in the Daughter, and well diſpoſed of by her Will. *Trin.* 1688. between Earl *Rivers* and Earl of *Darby*, 2 *Vern.* 72.

8. If *A.* by Will gives 500 *l.* to his Daughter, to be paid by his Executors, at the Age of twenty-one, out of his Perſonal Eſtate and Rents of his Real; and if not raiſed by that Time, the Executors to ſtand ſeiſed, and take the Rents till the 500 *l.* is raiſed; and after Payment gives the Land to his Son; the Daughter marries at eighteen, and dies under twenty-one, leaving Iſſue a Daughter; the Huſband takes Adminiſtration; the Portion ſhall be raiſed, and that by a Sale, tho' the Land, by Reaſon of Incumbrances, will produce lit-

tle more than the 500 *l.* Decreed *Paſch.* 1701. between *Jackſon* and *Farrand*, 2 *Vern.* 424.

9. An Eſtate was deviſed to the eldeſt Son, provided he or his Heirs pay 100 *l.* a-piece to his three Siſters, at their Age of twenty-one, or Marriage; one of the Daughters dies before twenty-one unmarried; after *J. S.* buys the Eſtate, and thinking it ſubject to the dead Daughter's Portion (a Bill being brought for it in this Court) gave Bond to her Executrix to pay it; but being afterwards adviſed, that the Land would not be liable, he brings his Bill to be relieved againſt it; and it was held by my Lord Keeper, that though by the Law now uſed in this Court, the Land would not be liable to the Portion; yet perhaps when the Bond was given, it might have been otherwiſe taken; and there being no Fraud in getting the Bond, he would not relieve againſt it. *Mich.* 1702. between *Smith* and *Avery*.

10. Upon a Marriage-Settlement a Term was created for raiſing Portions for Daughters at eighteen, or Marriage; there was a Son and a Daughter of the Marriage; the Son died, and the Inheritance deſcended to the Daughter, who attained her Age of eighteen Years, and then fell ſick, and in her Sickneſs made her Will, and thereby gave ſome ſmall Legacies, and then gave all, whatſoever ſhe had a Power to diſpoſe of, to her Mother, and made her Executrix, and died, not having attained her Age of twenty-one Years; and the Queſtion was, whether, by the Deſcent of the Inheritance to the ſame Perſon that was to have the Portion raiſed, the Land ſhall be thereby diſcharged of the Portion, or whether the Defendant ſhould have Right to it by the Will of her Daughter; it was decreed for the Mother; and that the Land could not be diſcharged of the Portion till the Daughter had been of Age to make her Election to have it ſo; eſpecially ſhe having made her Will, and in general Words deviſed it to her Mother: On an Appeal to the Lords this Decree was affirmed. *Hill.* 1701. between *Thomas* and *Keymis*.

11. A Term was created for raiſing a Daughter's Portion; but it being extinguiſhed by the Deſcent of the Inheritance on the Daughter, it was revived again in Equity, for the Benefit of Creditors. Between *Powell* and *Morgan*, a Caſe cited 2 *Vern.* 208. *vide* Title *Creditor and Debtor*.

## (E) Where the Heir ſhall have the Benefit and Aid of the Perſonal Eſtate.

1. IF an Heir is ſued upon a Bond-Debt of his Anceſtor's, in which he is bound, and he pays the Money, the Executor ſhall reimburſe him as far as there are Perſonal Aſſets of the Teſtator's come to his Hand. *Paſch.* 18 *Car.* 2. between *Armitage* and *Metcalf*, 1 *Chan. Ca.* 74. *vide* 2 *Chan. Ca.* 5. That the Perſonal Eſtate in the Hands of the Executor ſhall be employed in Eaſe of the Heir, by whatever Means the Heir became indebted as Heir; for the Perſonal Eſtate having received the Benefit by contracting the Debt, it is reaſonable that Satisfaction ſhould be made out of it.

2. If a Man mortgages Lands, and covenants to pay the Money, and dies, the Perſonal Eſtate of the Mortgagor ſhall, in Favour of the Heir, be applied to exonerate the Mortgage. Between *Cope* and *Cope*, 2 *Salk.* 449. *in Canc'*.

3. But if the Grandfather mortgages, and covenants to pay the Mortgage-money, and the Lands deſcend to his Son, and his Son dies, having a Perſonal Eſtate and a Son, the Son's Perſonal Eſtate ſhall not go in Aid of this Mortgage. 2 *Salk.* 450.

4. So where *A.* mortgages his Land to *B.* and afterwards ſells it to *C.* for 1000 *l.* which includes the Mortgage-money, *C.* ſhall pay the Mortgage, and ſhall have no Aid of the Perſonal Eſtate of *A.* for he has made it his own Debt. 2 *Salk.* 450. *vide* 1 *Vern.* 37. that where the Equity of Redemption is purchaſed, the Mortgage ſhall not be diſcharged out of the Perſonal Eſtate.

5. If Lands in Mortgage are deviſed to *J. S.* the Deviſee ſhall not have Aid of the Teſtator's Perſonal Eſtate in the Hands of the Executor. *Hill.* 27 *Car.* 2. between *Corniſh* and *Mew*, 1 *Chan. Ca.* 271. *vide* 1 *Vern.* 36. *Pockley* and *Pockley cont'*, where it is held by my Lord Chancellor, that not only the Heir, but likewiſe a Deviſee, or *Hæres Factus*, ſhall have the Benefit of the Perſonal Eſtate; and 2 *Chan. Ca.* 84. *S. C.* and *S. P.* and that Debts ſhall be paid out of the Perſonal Eſtate in Favour of a Deviſee, tho' a Widow, who claims a Third by the Cuſtom of the Province of *York*, is prejudiced thereby. *Q.*

6. If there be no Covenant in the Deed for the Payment of the Mortgage-money, yet the Perſonal Eſtate ſhall be liable in the Hands of the Executor. 2 *Salk.* 449. 1 *Vern.* 436. *S. P. arguendo.*

7. But if a Mortgage in Fee is made redeemable at *Michaelmas* 1710. or at any other *Michaelmas*, on ſix Months Notice, and no Covenant to pay the Money; and the Mortgagor continues in Poſſeſſion, pays the Intereſt, and by Will deviſes his Perſonal Eſtate to his Wife and Daughter; the Perſonal Eſtate is not liable in Eaſe of the Real, there being no Covenant either expreſſed or implied. *Mich.* 1715. between *Howell* and *Price*, 2 *Vern.* 701.

8. If an Heir has Lands deſcended to him, incumbered with a Mortgage, and he, before any Application made by him to have Aid of the Perſonal Eſtate, diſpoſes of them, he cannot afterwards come upon the Perſonal Eſtate; for the Equity that an Heir has, is that the Lands may deſcend clear to the Family. *Mich.* 1702. between *Wood* and *Fenwick*.

9. If a Man makes a Settlement of his Eſtate on Truſtees, for Performance of his Will, and Payment of Debts and Legacies, and at the ſame Time makes his Will, and thereby deviſes that the Truſtees ſhall pay ſeveral Legacies, and that the Surplus ſhall go to the Heir, and makes his Wife Executrix, but does not expreſly deviſe the Perſonal Eſtate to her; the Perſonal Eſtate in this Caſe ſhall be applied in Eaſe of the Real. *Hill.* 28 *Car.* 2. between Lord *Grey* and Lady *Grey*, 1 *Chan. Ca.* 296.

10. If Lands be deviſed for the Payment of Debts and Legacies, and the Reſidue of the Perſonal Eſtate be given to the Executors, after the Debts and Legacies paid, the (*a*) Perſonal Eſtate ſhall notwithſtanding, as far as it will go, be applied to the Payment of the Debts, and the Land charged no further than is neceſſary to make up the Reſidue. *Paſch.* 32 *Car.* 2. 2 *Vent.* 349.

(*a*) By the ſeveral Caſes adjudged on this Head, the general Rule appears to be, that the Heir at Law ſhall have the Perſonal Eſtate in Exoneration of the Real, unleſs there be expreſs Words to exempt it, or unleſs the Intent of the Teſtator ſtrongly appears that it ſhould be exempt.

11. If a Man deviſes Lands for Payment of his Debts, and makes an Executor, and leaves a Perſonal Eſtate, no Part of the Perſonal Eſtate ſhall go to the Payment of the Debts; becauſe by making of an Executor, the Teſtator's Intent appears, that the Executor ſhould have the Goods, the Teſtator having made another Proviſion for the Payment of his Debts; but if a Man diſpoſes of Lands for the Payment of his Debts, and after dies Inteſtate, the Perſonal Eſtate ſhall be chargeable in the Hands of the Adminiſtrator; for no ſuch Intent appears, as before; *per* Serjeant *Fountain*, and admitted by the *Maſter* of the *Rolls*. 18 *Car.* 2. between *Feltham* and *Harlſton*, 1 *Lev.* 203. *Q.* and *vide* 2 *Vern.* 120. That a Deviſee of Lands charged ſhall have it before an Executor, unleſs it be expreſly deviſed to him.

12. If a Man deviſes his Fee-farm Rents to be ſold for Payment of his Debts, and the Surplus to go betwixt his Heir at Law and his younger Brother, and deviſes his Houſhold-Goods to go with his Houſe, and the Reſidue of his Perſonal Eſtate to his Siſter; the Perſonal Eſtate ſhall not be applied to pay Debts in Eaſe of the Real. *Mich.* 1716. between *Wainwright* and *Bendlowes*, 2 *Vern.* 718. And *per* Lord Chancellor, there is a Difference where an Eſtate is only charged with Payment of Debts, and where it is deviſed to be ſold out and out to pay Debts. *Vide* 2 *Vent.* 359. And that in the firſt Caſe, the Reſidue of the Perſonal Eſtate ſhall not go in Exoneration of the Real.

13. *A.* by Will gives ſeveral pecuniary Legacies, and after deviſes Lands to Truſtees and their Heirs, in Truſt that they do and ſhall by Mortgage or Sale of the ſaid Premiſſes, or any Part thereof, pay and ſatisfy his Debts and the ſaid Legacies and Funeral Expences; then he deviſes all his Goods, Chattels and Houſhold-Stuff in ſuch a Houſe to another; and then goes on in theſe Words, *All the Reſt and Reſidue of my Perſonal Eſtate I give and deviſe to my Wife, whom I make Sole Executrix. Per Cur'*, The Reſidue of the Perſonal Eſtate belongs to the Wife, in the Nature of a ſpecifick Legacy, exempt from Debts, Legacies and Funerals; for tho' the Perſonal Eſtate is the natural Fund for them; yet here he has expreſly provided another for that Purpoſe, by Words of an imperative Signification, *that the Truſtees do and ſhall, &c.* which is ſtronger than a bare Charge of them on his Real Eſtate, and might be intended only auxiliary to his Perſonal Eſtate, which Will, without Words of Exemption, might be liable in the firſt place; and tho' the Words *Reſt and Reſidue of his Perſonal Eſtate*, are generally underſtood, Reſt and Reſidue after Debts, Legacies and Funerals; yet here they are relative to the laſt Antecedent of the Deviſe of his Goods, Chattels and Houſhold-ſtuff at ſuch a Houſe, and paſs to his Wife as a ſpecifick Deviſe in the ſame Manner as the next preceding Deviſe did to the Deviſee thereof, and are to be underſtood the Reſidue of what he had not before particularly deviſed; not the Reſidue after Debts paid. *Hill.* 1724. between *Adams* and *Meyrick*, at the *Rolls*.

## (F) In what Caſes there ſhall be a reſulting Truſt for the Benefit of the Heir.

1. IF Lands are appointed to pay Debts, the Heir is intitled to have the Lands when the Debts are paid; if to be ſold, he is intitled to the Surplus; but if there be any Abuſe, he muſt take his Remedy againſt the Truſtee, and not againſt the Purchaſer. 34 *Car.* 2. between *Culpepper* and *Aſton*, 2 *Chan. Ca.* 115. *Q.* If not in ſome Caſes againſt a Purchaſer; and *vide* of what Things a Purchaſer muſt take Notice at his Peril, Title *Notice.*

2. If a Term for Years is created for a particular Purpoſe; as to raiſe Portions, *&c.* the Surplus ſhall go to the Heir. 1 *Salk.* 154.

3. But where *J. S.* made her Will in the following Words, *viz. I ordain and conſtitute* H. N. *to be my Executor of this my Laſt Will, and I do give all my Eſtate, Real and Perſonal, to diſpoſe of for the Payment of all my juſt Debts, and for the Performing of all ſuch Legacies as I have herein, or by the Codicil annexed, bequeathed unto my Executor above-named*; and gives ſeveral Legacies in Money, and amongſt others 200 *l.* to her Uncle, who was Heir at Law; and by a Codicil gives the Siſter of *H. N.* her Executor 500 *l.* but gives him nothing; and it was held by my Lord Keeper and four Judges, that there was no reſulting Truſt for the Benefit of the Heir, and that *H. N.* had a Fee, for otherwiſe he would reap no Benefit by the Deviſe. *Hill.* 22 *Car.* 2. between *North* and *Crompton*, 1 *Chan. Ca.* 196, 197.

4. If Lands are deviſed to Truſtees to ſell, and out of the Money ariſing by Sale, amongſt other Sums, to pay 100 *l.* to his Heir at Law, and no Diſpoſition is made by the Teſtator of the Surplus of his Eſtate, the Land ſhall not be turned into Perſonal Eſtate; nor more ſold than is neceſſary to pay the Legacies; and the Heir ſhall have the Reſidue as a reſulting Truſt. *Paſch.* 1701. between *Randall* and *Bookey*, 2 *Vern.* 425.

5. So if *A.* by Will deviſes his Land to Truſtees to ſell, and to diſpoſe of the Money as he by Writing would appoint; and for Want of Appointment, to his four Nephews, and *A.* by Writing appoints his Truſtees to pay ſeveral Sums to ſeveral Perſons, but not near the Value of the Land; the Heir ſhall have the Reſidue, and not the Nephews, as an Intereſt reſulting and not diſpoſed of. Decreed *Hill.* 1706. between the City of *London* and *Garway*, 2 *Vern.* 571.

6. If *A.* deviſes his Real Eſtate to Executors, to be ſold for Payment of Debts, the Surplus, if any be, to be deemed Perſonal Eſtate, and go to his Executors, to whom he gives 20 *l.* a-piece, the Surplus ſhall be a Truſt for the Heirs at Law. Decreed and affirmed in the Houſe of Lords, between Counteſs of *Briſtol* and *Hungerford*, 2 *Vern.* 645.

7. If Lands are deviſed to three Perſons and their Heirs, to the Uſe of them and their Heirs, upon the Truſts after-mentioned, and then the Teſtator directs them to convey Part to *A.* for Life, and other Part to *B.* in Tail, but gives no Direction as to the Remainder in Fee, tho' two of the Truſtees be related to the Teſtator; yet the Remainder will not belong to them, but be a reſulting Truſt for the

Benefit of the Heir. *Hill.* 1709. between *Hobart* and Counteſs of *Suffolk*, 2 *Vern.* 644.

8. But where *J. S.* by Will deviſed to his Couſin *T. M.* by Name, all his Meſſuage called, *&c.* to have and to hold to him and his Heirs for ever in Truſt, to be ſold for the Payment of all his Debts and Legacies, within a Year after his Death; and makes him Executor; but gives him no Legacy, tho' he was as nearly related to him as the Heir at Law: And it was held by two Lords Commiſſioners againſt one, that there ſhould be no reſulting Truſt; for then the Executor, who was taken Notice of as Couſin, would have nothing but his Labour for his Pains. *Mich.* 1691. decreed between *Counyngham* and *Melliſh*; which was affirmed in Parliament.

## (G) What Things ſhall go to the Heir, and not to the Executor.

1. IF there be a Mortgage in Fee, and two Deſcents caſt, and there is more due on it than the Value of the Land; and though the Mortgagor ſays he will not redeem, yet it ſhall go to the (*a*) Executor, and not to the Heir; the Equity of Redemption not being foreclоſed or releaſed. *Mich.* 1699. between *Tabor* and *Grover*, 2 *Vern.* 367.

(*a*) To whom the Mortgage-Money is to be paid, *vide* Title *Mortgages*, Letter (B.)

2. But if a Mortgagee in Fee enters for a Forfeiture, and after ſeven Years Enjoyment abſolutely ſells the Lands to *J. S.* and his Heirs; this Eſtate ſhall not be looked upon to be a Mortgage in the Hands of *J. S.* ſo as to make it Part of his Perſonal Eſtate; but it ſhall be for the Benefit of the Heir. *Mich.* 1684. between *Cotton* and *Iles*, 1 *Vern.* 271.

3. If a Man has ſeveral Mortgages, one of which is a Mortgage in Fee, on which he entred for a Forfeiture; and he deviſes thoſe Lands which were mortgaged in Fee, to his two Daughters and their Heirs; and the other Mortgages to them, their Executors, *&c.* and one of the Daughters dies, her Share of the mortgaged Lands in Fee ſhall go to her Heir, and not to her Adminiſtrator; for it was the Teſtator's Intent, that thoſe Lands ſhould paſs as Real Eſtate, tho' between him and the Mortgagor they were but a Mortgage. *Hill.* 1706. between *Noys* and *Mordaunt*, 2 *Vern.* 581.

4. If the Heir of the Mortgagee foreclоſes the Mortgagor, yet the Land ſhall go to the Executor, unleſs the Heir thinks fit to pay him the Mortgage-Money, and then he may have the Benefit of the Mortgage. 2 *Vern.* 67.

5. If Money by Marriage-Articles be agreed to be laid out in Land, and ſettled on the Husband and Wife for Life, Remainder to their Iſſue, Remainder to the Husband in Fee; with a Proviſo, that in Caſe the Husband died without Iſſue, the Wife might make her Election, whether ſhe would have the Land or Money: The Huſband dies before any Purchaſe made, leaving his Wife *Enſeint* of a

Daughter, who was born ſoon after his Death, but died at a Month old; this Money ſhall not be laid out in a Purchaſe, for the Benefit of the Heir of the Husband, but ſhall go to the Wife, as Adminiſtratrix to her Husband and Daughter; but it would be otherwiſe, had a Bill been brought in the Life-time of the Infant; *per North* Lord *Keeper. Hill.* 1684. between *Kettleby* and *Atwood*, 1 *Vern.* 298, 299. but this Decree was reverſed by Lord *Jefferies*; who held, that the Money was bound by the Marriage-Agreement. 1 *Vern.* 471. But if Money be agreed to be laid out in Land, in a Marriage-Settlement, and there is no Iſſue, whether this Money ſhall be looked upon as Land, and thereby defeat Simple Contract-Creditors, *Quære* 1 *Salk.* 154.

6. If the Wife's Portion, and the like Sum of the Husband's Money, is agreed to be laid out in Lands, to be ſettled on them and the Heirs of their Bodies, without mentioning how the Remainder over ſhould be limited, and they both die without Iſſue, and before any Purchaſe made; the Money ſhall be paid to the Heir of the Husband, and not to the Adminiſtratrix of the Wife, though ſhe ſurvived the Husband. *Paſch.* 1687. between *Knight* and *Atkyns*, 2 *Vern.* 20, 21.

7. If by Marriage-Articles it is agreed, without any poſitive Covenant, that 500 *l.* being the Wife's Portion, ſhould by the Conſent of the Husband and Wife be laid out in Lands, and ſettled on the Husband and Wife for their Lives, Remainder to the Heirs of their two Bodies, Remainder to the Heirs of the Body of the Wife, Remainder to the Wife's Brother in Fee, and the Wife dies without Iſſue, and then the Husband dies; the 500 *l.* not being laid out; this Money ſhall not be taken as Land, and therefore go to the Brother, to whom the Fee was limited; *per Trevor* and *Rawlinſon* Lords Commiſſioners, againſt *Hutchins*, *Paſch.* 1691. between *Symons* and *Rutter*, 2 *Vern.* 227.

8. If a Man purchaſes Lands in his own Name, and takes an Aſſignment of a mortgage Term in the Name of a Truſtee, yet the Term ſhall attend the Inheritance, and go to the Heir. *Hill.* 1680. between *Tiffin* and *Tiffin*, 1 *Vern.* 1.

9. So if a Purchaſer takes the Mortgage Term in his own Name, and the Inheritance in the Name of a Truſtee, yet it ſhall go to the Heir, though not mentioned to attend the Inheritance. *Mich.* 35 *Car.* 2. between *North* and *Langton*, 2 *Chan. Ca.* 156. 2 *Chan. Rep.* 271. *S. C.* but where a Term attending on the Inheritance ſhall or ſhall not be Aſſets, *vide* what ſhall be Aſſets, Title *Executor* and *Adminiſtrator*.

10. If a Woman, who is a *Ceſtui que Truſt* of a Term, having the Inheritance in her, marries and dies; the Term ſhall attend the Inheritance, and not go to the Husband as Adminiſtrator of his Wife. *Mich.* 1705. between *Beſt* and *Stamford*, 2 *Vern.* 520. 1 *Salk.* 154. *S. C.*

11. If the Plaintiff's Father ſeiſed in Fee of Lands, articles to pay *J. S.* 1000 *l.* to build an Houſe on the Premiſſes, and dies before the Houſe is built, the Heir may compel the Builder to build it, and the Father's Executor to pay for it. Decreed between *Holt* and *Holt*, *Mich.* 1694. 2 *Vern.* 322.

12. If the Dean and Chapter of —— make a Leaſe to a Man, his Executors and Adminiſtrators, for three Lives; this ſhall be a deſcendable Eſtate, and go to the Heir, and not to the Executor; *per Cur'*. but the Cauſe ended by Compromiſe; between St. *John*'s *College* and *Theming*, 2 *Vern.* 320.

13. Pictures and Glaſſes, tho' generally ſpeaking, Part of the Perſonal Eſtate, yet if put up inſtead of Wainſcot, or where otherwiſe Wainſcot would have been put, ſhall go to the Heir, for the Houſe ought not to come to the Heir maimed or disfigured. 2 *Vern.* 4 *Co.* 64. a. 508.

## (H) What ſhall be Aſſets by Diſcent in the Hands of the Heir.

1. AN Equity of Redemption of a Mortgage in Fee, tho' not Aſſets at Law, yet is Aſſets in Equity; and if aliened or releaſed by the Heir, he ſhall be anſwerable for the Value. *Paſch.* 1688. between *Sawley* and *Gower*, 2 *Vern.* 61.

What ſhall be Aſſets, *vide* Title *Executors and Adminiſtrators.*

2. If a Man obtains Judgment againſt an Heir, who has a Reverſion in Fee deſcended on him, the Judgment is only of Aſſets, *quando acciderint*, and the Creditor cannot by a Bill in Equity compel the Heir to ſell the Reverſion; but muſt expect until it falls. *Hill.* 1690. between *Fortrey* and *Fortrey*, 2 *Vern.* 134.

## (I) Unreaſonable Bargains and Securities obtained from young Heirs, in what Caſes to be ſet aſide. *Vide* Title *Bonds.*

1. IF an Heir Apparent be intitled to an Eſtate Tail, after the Death of his Father, which, if in Poſſeſſion, is worth 800 *l.* and he is caſt off by his Father, and deſtitute of all Means of Livelihood; and he for 30 *l.* paid him in Money, and 20 *l. per Ann.* ſecured to be paid him, during the joint Lives of him and his Father, abſolutely conveys his Remainder in Tail to *J. S.* and his Heirs; and the Father lives ten Years after this Conveyance, yet the Heir ſhall be relieved againſt this Conveyance, altho' it was abſolute; and tho' *J. S.* had loſt his Money if the Heir had died in his Father's Life-time; *per Nottingham* L. C. *Trin.* 34 *Car.* 2. between *Not* and *Hill*, 1 *Vern.* 167, 168. But upon a Re-hearing, this Decree was reverſed by *North* Lord *Keeper*, who ſaid he could not relieve the Heir, unleſs it be declared a Law in Chancery, that no Man muſt deal with an Heir in his Father's Life-time; but upon a ſecond Re-hearing, this laſt Decree was reverſed, and the firſt eſtabliſhed by *Jefferies* L. C. who ſaid, that he took it to be an unrighteous Bargain from the Beginning, and that nothing which happened afterwards could help it. 2 *Chan. C.* 120. *S. C.* 2 *Vern.* 27. *S. C.*

2. If one intitled to an Eſtate, after the Death of two old Lives, takes 350 *l.* to pay 700 *l.* when the Lives fall, and mortgages the Eſtate as a Security; tho' both the Lives die within two Years, yet there

there ſhall be no Relief (*a*) againſt this Bargain. *Hill.* 1682. between *Batty* and *Loyd*, 1 *Vern.* 141.

(*a*) *Note*; theſe hazardous Bargains, with Heirs or others, are not always ſet aſide in a Court of Equity, for they may be fair; and it is only upon the Circumſtance of Fraud, or being extreamly unreaſonable, that they can be overthrown: But Bargains of this Kind will not be aſſiſted in a Court of Equity, though there are not ſufficient Grounds to ſet them quite aſide. *Vide* 1 *Vern.* 271. 2 *Chan. Ca.* 136, 137. 2 *Vern.* 15. And *Note*, That regularly the Party, who comes to be relieved, muſt reſtore the Money paid, &c. according to that Maxim in Equity, *He who would have Equity done him, muſt do it to others.* But for this, *vide* where Relief has been given againſt unreaſonable Bonds obtained from young Heirs, Title *Bonds and Obligations*, and *vide*

# CAP. XXXIII.

# Of Ideots and Lunaticks.

(A) Of Ideots and Lunaticks, who are ſuch, how found; to whoſe Cuſtody to be committed; and here of the Power and Duty of their Committees, and of Abuſes done them.

(B) What Acts of Ideots and Lunaticks are good, void or voidable.

## (A) Of Ideots and Lunaticks, who are ſuch, how found, to whoſe Cuſtody to be committed; and here of the Power and Duty of their Committees, and of Abuſes done them.

1. THE King by Letters Patent granted to *A.* the Cuſtody of *C. D. Habendum* to *A.* his Executors, Adminiſtrators and Aſſigns, during the Ideocy of the ſaid *C. D.* after the Death of *A. P.* obtain'd Letters Patent for the Cuſtody of the ſaid Ideot; and upon arguing the Point, *viz.* whether the Cuſtody of an Ideot, can by Law be granted to a Man, his Executors, Adminiſtrators

ſtrators and Aſſigns, my Lord Chancellor inclined that it could not; for tho' it be an Advantage and Emolument to the King, yet it is coupled with a Truſt; and if the Grantee ſhould die inteſtate, or make an Infant Executor, it would be highly inconvenient; and he ſaid there was no Precedent of any ſuch Grant from the Time of the making the Statute *de Prærogat. Regis*, *Mich.* 1681. between *Prodgers* and *Phrazier*. 1 *Vern.* 9. 1 *Vern.* 137. *S. C.* where it is ſaid, that my Lord Keeper *North* refuſed to do any Thing in it, till the Validity of the Patent was determined in a legal Way. *Vid.* 3 *Mod.* 43. *S. C.* where in *B. R.* the Grant to the Executors was held good; for the King has the ſame Intereſt in an Ideot, that he had in his Ward, which always went to the Executor of his Grantee; but it was otherwiſe of a Lunatick.

2. If an Inquiſition find that ſuch a one was an Ideot for eight Years laſt paſt, ſuch Inquiſition is void; for an Ideot muſt be found to be ſo *a nativitate*, otherwiſe it is not an Ideot, but a Lunatick only. Between *Prodgers* and *Phrazier*, 1 *Vern.* 12. *per* Lord *Chancellor*. *Vid.* 3 *Mod.* 43. *S. C.* in *B. R.* where this finding was held ſufficient; for the Inquiſition finding the Party an Ideot, the Adding eight Years was ſuperfluous.

3. A Woman was found a Lunatick, and the Cuſtody of her was committed to a Stranger; on Application made by her Siſter, to have the Cuſtody, ſhe inſiſted, that as ſhe was next of Kin, ſo ſhe was the propereſt Perſon for that Purpoſe; for being intitled to Adminiſtration to the Lunatick, ſhe would be the more careful of her Effects; and the Objection to a Guardian as next of Kin, who may inherit, will not hold in this Place, becauſe there is no Inheritance. My Lord Chancellor held, that this was not a Matter of Right, but of Prudence, and that he would not remove her from the Cuſtody of the Stranger, nor ever grant the Cuſtody of a Lunatick to one who ſhould make gain of it; but he ſaid the Siſter ſhould be called to the Yearly Account before the Maſter. Lady *Cope*'s Caſe, 2 *Chan. Ca.* 239.

4. A Lunatick, before he became ſuch, made a Mortgage of a good Part of his Eſtate for 50 *l.* afterwards his Committee tranſferred this Mortgage, and took up 3 or 400 *l.* more upon it; and my Lord *Keeper* declared, the Mortgage ſhould ſtand a Security for 50 *l.* only; and he likewiſe held that the Committee of a Lunatick has an Eſtate but during Pleaſure, and therefore cannot make Leaſes, nor any ways incumber the Lunatick's Eſtate, without ſpecial Order of this Court, where the Profits are not ſufficient to maintain the Lunatick. And as to Improvements and Buildings, made by a Committee, on the Lunatick's Eſtate, that the Heir, upon the Lunatick's Death, muſt be let into the Eſtate, without making any Allowance for ſuch Improvements. *Mich.* 1684. between *Foſter* and *Merchant*, 1 *Vern.* 262.

5. The Committees of a Lunatick, having inveſted Part of the Lunatick's Perſonal Eſtate in a Purchaſe of Lands, made in the Lunatick's Name, to him and his Heirs; the Queſtion was, whether the Committees had not exceeded their Power, by changing the Perſonal Eſtate into a Real Eſtate, and thereby defeating the next of Kin, in Favour of the Heirs at Law. And after great Debate, and upon reading the Statute made touching the Granting of the Cuſtody of the Lunatick, whereby it is provided, that the Surplus ſhall be

ſafely kept and delivered to him, if he recover; if not, upon his Death to be employed for the Benefit of his Soul, *&c.* The Court decreed an Account of the Perſonal Eſtate, and the Lands purchaſed to be ſold, and the Money to go and be divided as Perſonal Eſtate, amongſt the next of Kin. *Mich.* 1690. between *Awdley* and *Awdley*, 2 *Vern.* 192.

6. If a Man forcibly takes away a Lunatick, whilſt ſhe is under Commitment, and marries her, this is ſuch a Contempt, for which the Court of Chancery will commit him; but if the Marriage is afterwards held good in the Spiritual Court, (as it may be by being conſummated in one of her lucid Intervals,) and if upon Inſpection it appears, that ſhe is reſtored to her underſtanding, the Husband ſhall be diſcharged, and the Commiſſion of Lunacy vacated. *Trin.* 1702. Mrs. *Aſher*'s Caſe.

## (B) What Acts of Ideots or Lunaticks are good, void or voidable.

1. IF a Man who is *non Compos Mentis* aliens Lands, this ſhall not be reſtored to himſelf in Chancery, upon a Matter of Equity, againſt the Maxim of the Common Law. 1 *Roll. Rep. per* Lord *Chancellor* and *J. Dodderidge. Q.*

2. *J. S.* by Inquiſition was the 23d of *June* 1664. found a Lunatick, with a Retroſpect of 17 Years; it was likewiſe found, that he aſſigned a Debt ſufficiently ſecured to him for the Purchaſe of a certain Manor; and on a Bill brought in his Behalf by the *Attorney General*, Juſtice *Tyrril* held, that he ought to be relieved, and of the ſame Opinion was my Lord *Keeper*, on a Rehearing; and ſaid, that it was not neceſſary, that the Lunatick ſhould be a Party, but gave the Defendant Leave to traverſe the Inquiſition. *Mich.* 20 *Car.* 2. between the *Attorney General* on Behalf of *Smith* a Lunatick, and Sir *Robert Parkhurſt*, 1 *Chan. Ca.* 113. *Vid.* 1 *Chan. Ca.* 153. *S. C.* cited, and there held, that it is neceſſary, that the Lunatick ſhould be made a Party; *ſecus* of an Ideot, and that it was diſpenſed with in the above Caſe, becauſe he ſhould not be admitted to ſtultify himſelf.

3. If *A.* Tenant for Life, with Remainder to his firſt Son in Tail, Remainder to *B.* in Fee, and *A.* being *non Compos*, ſurrenders by Deed to *B.* before he has a Son, this Deed of Surrender is abſolutely void, and the contingent Remainder not deſtroyed. Between *Thomſon* and *Leach*; adjudged in *B. R.* and affirmed on a Writ of Error in the Houſe of Lords, *Show. P. C.* 150. 2 *Salk.* 427. *S. C.* 3 *Lev.* 284. 2 *Salk.* 576. *S. C. vid.* 2 *Chan. Ca.* 103. where a Conveyance made by a Perſon of weak Underſtanding was ſet aſide; and 2 *Vern.* 189.

4. *A.* obtained a Purchaſe at a great Undervalue by Deeds, Fines and Recoveries, from one who was a Lunatick; and on Application of his Committee, the Purchaſe was ſet aſide. 2 *Vern.* 678. *vid.* 2 *Vern.* 414. that a Settlement made by a Lunatick, tho' not unreaſonable, ſhall be ſet aſide; *vid.* 1 *Vern.* 155. where the Court directed that a Settlement, which was intended to be made by one who was found a Lunatick, but it was urged was reſtored to his Underſtanding, ſhould be made by Fine in *C. B.* that the Judges might in-

ſpect and examine him; *vid.* 1 *Vern.* 105. that a Will made by one who afterwards becomes *non Compos*, is not revoked by his being found afterwards a Lunatick; and that a Bill will not lie to eſtabliſh the Teſtimony of the Witneſſes to it *in Perpetuam rei Memoriam.*

5. A Bill was brought by a Lunatick and his Committee, to ſet aſide a Settlement, which had been obtained from him by the Defendant, before the Iſſuing out of the Commiſſion of Lunacy; but ſubſequent to the Time, wherein by the Commiſſion he was found to have been a Lunatick; and the Bill charged ſeveral Acts of Inſanity and Diſtraction, previous to the Making of the Settlement, and the Iſſuing out of the Commiſſion; and charged likewiſe that the Commiſſion of Lunacy was ſtill in Force. 'To this Bill the Defendants demurred, for that 'twas againſt a known Maxim of Law, that any Perſon ſhould be admitted to ſtultify himſelf, becauſe, during the Continuance of the Lunacy, he cannot be ſuppoſed to know what he did: But my Lord Chancellor over-ruled the Demurrer, and ſaid, that Rule was to be underſtood of Acts done by the Lunatick to the Prejudice of others, that he ſhould not be admitted to excuſe himſelf on Pretence of Lunacy; but not as to Acts done by him to the Prejudice of himſelf; beſides, here the Committee is likewiſe Plaintiff, and the ſeveral Charges of Lunacy are by him, in Behalf of the Lunatick; and it has been always held, that the Defendant muſt anſwer in that Caſe; and ſo he was ordered to do here, tho' the Settlement was not unreaſonable in it ſelf, being only to limit the Eſtate in Queſtion to the Defendants, the Uncles, in Caſe of Failure of Iſſue Male of the Lunatick, with Power for the Lunatick to charge the ſame with conſiderable Portions for his three Daughters, and a Power of Revocation. *Mich.* 1729. between *Ridler* and *Ridler*, at my Lord *Chancellor*'s.

CAP.

# CAP. XXXIV.

## Infant.

(A) Infants, how far favoured in Equity.
(B) How far bound in Equity, or less favoured than at Law.
(C) What Acts of Infants are good, void or voidable.

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## (A) Infants, how far favoured in Equity.

1. IF a Man intrudes upon an Infant, he ſhall receive the Profits but as Guardian, and the Infant ſhall have an Account againſt him in (a) Chancery, as Guardian. 1 *Vern.* 295. *per* Lord *Keeper*.

(a) The Intereſt of Infants is ſo far regarded and taken care of in this Court, that no Decree ſhall be made againſt an Infant, without having a Day given him, to ſhew Cauſe after he comes of Age: An Infant may by his *Prochein amy* call his Guardian to an Account, even during his Minority: If a Stranger enters and receives the Profits of an Infant's Eſtate, he ſhall, in Conſideration of this Court, be looked upon as a Truſtee for the Infant. *Per Holt* Ch. Juſt. in his Argument of the Caſe of Lord *Falkland* and *Bertie*, 2 *Vern.* 342. this Court will Decree building Leaſes for ſixty Years, of Infants Eſtates, when it appears to be for their Good. 2 *Vern.* 224.

2. If a Man, during a Perſon's Infancy, receives the Profits of an Infant's Eſtate, and continues to do ſo for ſeveral Years after the Infant comes of Age, before any Entry is made on him; yet he ſhall account for the Profits throughout, and not during the Infancy only. Decreed *Paſch.* 1699. between *Yallop* and *Holworthy*.

3. An Infant cannot be foreclоſed, without a Day to ſhew Cauſe after he comes of Age; but the proper Way in ſuch a Caſe is to decree the Lands to be ſold to pay the Debts, and that will bind the Infant; *per Cur'*, between *Booth* and *Rich*, 1 *Vern.* 295. But if there be a Mortgage, and it depends upon a diſputable Title, ſo that no Money can be had by an Aſſignment of it over, Equity will not Decree an Infant to be foreclоſed till he comes of Age. 2 *Vent.* 351.

4. If Lands are deviſed to be ſold for Payment of Debts, the Lands may be decreed to be ſold without giving the Heir, who is

an Infant, a Day to ſhew Cauſe, when he comes of Age, for nothing deſcends to him; but if he is decreed to join in the Sale, he muſt have a Day after he comes of Age. Decreed on a Bill of Review, *Hill.* 1701. between *Cooke* and *Parſons*, 2 *Vern.* 429.

5. If an Infant puts in an Anſwer by Guardian, and there is a Decree againſt him, without any Day given him to ſhew Cauſe, ſuch Anſwer ſhall not be read, or admitted as Evidence againſt him when he comes of Age; but if a ſuperannuated Defendant puts in an Anſwer by his Guardian, it ſhall be read againſt him at any Time after; for he is ſuppoſed to grow worſe, and is not to have a Day to ſhew Cauſe. *Per* Lord *Keeper, Trin.* 1704. between Sir *Richard Leving* and Lady *Caverly.*

6. If *A.* deviſes Lands to Truſtees until Debts paid, and then to an Infant and his Heirs, and *J. S.* enters and levies a Fine, and five Years paſs, and the Infant, when of Age, brings an Ejectment, but is barred, becauſe the Truſtees ſhould have entered; yet Equity will relieve, and not ſuffer an Infant to be barred by the Laches of the Truſtees, nor to be barred of a Truſt Eſtate during his Infancy; and the Infant, in this Caſe, ſhall recover the mean Profits. Decreed *Mich.* 1699. between *Allen* and *Sayer*, 2 *Vern.* 368.

7. A Court of Equity may, by the Approbation of an Infant's Relations, allot the Infant Maintenance out of a Truſt Eſtate, tho' there be no Proviſion in the Truſt for that Purpoſe; and this is founded on natural Equity. *Trin.* 1691. between *Englefield* and *Englefield*, 2 *Vern.* 236.

## (B) Infants, how far bound in Equity, or leſs favoured than at Law.

1. INfants have been obliged to Anſwer in Equity, when the Parol ſhould have demurred at Law. *Toth.* 108.

2. A Sequeſtration may iſſue againſt an Infant. 2 *Chan. Ca.* 163.

3. Infants may be foreclоſed of the Equity of Redemption. *Vide* 1 *Vern.* 295. 2 *Vent.* 350.

4. If an Anceſtor dies indebted by Bond, in which the Heir is expreſly bound, and leaves no Perſonal Aſſets, and the Lands deſcend on an Infant Heir, whether Equity will, during the Minority of the Heir, decree Satisfaction, *Quære*; *& vide* 1 *Vern.* 173. Where it is ſaid, that Infants may be ſued in Equity, and that there is no Precedent, that the Parol ſhould demur; and 1 *Vern.* 428. where the Maſter of the *Rolls* ſaid, that he thought ſuch a Decree reaſonable; but the Reporter adds a *Dubitatur* to it.

5. If one gives her Son other Lands in Lieu of Lands intailed, and by her Will gives her intailed Lands to her Daughter, and takes a Bond from her Son to permit her Daughter to enjoy the intailed Lands, and the Son dies, leaving an Infant Son, who being in Poſſeſſion of the Lands that came in Recompence, brings an Ejectment for the intailed Lands; but by Reaſon of the Infancy of the Grandſon, the Bond cannot be ſued; if the Daughter brings a Bill, ſhe ſhall by Decree be quieted in Poſſeſſion of the intailed Lands, until ſix Months after the Infant comes of Age, and then the

Infant may ſhew Cauſe. *Trin.* 1691. between *Thomas* and *Gyles*, 2 *Vern.* 232.

6. If Lands are given by Will to a Woman and the Heirs of her Body, and it is declared, that if ſhe left no Sons, and only two Daughters, the eldeſt ſhould pay the youngeſt 300*l.* and have the whole Eſtate; if there are two Daughters only, and the 300*l.* is not paid, and the younger brings a Bill for an Account of Profits, and for Poſſeſſion of Half the Eſtate; the Court will decree the eldeſt Siſter, though an Infant, to pay the 300*l.* in ſix Months, with Intereſt from the Mother's Death, or in Default, to account for Profits of a Moiety, and the Moiety to be ſet out by Commiſſioners, and to be held and enjoyed by the younger Siſter; but the elder, being an Infant, muſt have a Day to ſhew Cauſe when ſhe comes of Age. *Hill.* 1704. between *Gundry* and *Baynard*, 2 *Vern.* 479.

7. An Infant ſhall be bound by Conditions in Fact, and ſuch Conditions as he can perform in Equity as well as in (*a*) Law. *Vide Fry* and *Porter*'s Caſe, 1 *Mod.* 300. 2 *Vern.* 343.

(*a*) An Infant is bound by all Conditions, Charges and Penalties in an original Conveyance, whether he comes to the Eſtate by Grant or Deſcent. 1 *Inſt.* 233. *b.*

8. *A.* gave Lottery-Tickets amongſt her Servants, on Condition, that if any of them came up a Prize of 20*l.* or more, they ſhould give one Half to her Daughter; the Ticket given the Foot-Boy, who was an Infant, came up 1000*l.* Prize; and it was held, that the Daughter was well intitled to a Moiety; for a Gift to an Infant, on Condition, binds him as well as another Perſon. *Trin.* 1706. between *Scot* and *Houghton*, 2 *Vern.* 560.

## (C) What Acts of Infants are good, void, or voidable.

1. IF an Infant ſells Lands for Money, and purchaſes other Lands with the Money; yet this Sale made by the Infant ſhall not be helped in Chancery, becauſe the Perſon of the Infant is diſabled by a Maxim in Law. 16 *Jac.* 1. *per* Lord *Chancellor*, *Dodderidge* and *Hutton*, 1 *Rol. Abr.* 376.

2. But if an Infant makes an Agreement, and receives Intereſt under it after he comes of full Age, ſuch Agreement ſhall be decreed againſt him. *Hill.* 1682. between *Franklin* and *Thornebury*, 1 *Vern.* 132.

3. So if an Infant makes an Exchange of Lands, and continues in Poſſeſſion after he comes of Age, he ſhall be bound by it. 2 *Vern.* 225. *per Curiam.*

4. If *A.* an Infant, deſires that Lands ſubject to a Truſt for Payment of younger Childrens Portions might not be ſold, and offers by his Anſwer to ſettle other Lands for raiſing the Portions; *A.* ſhall be bound by the Offer made by him in his Anſwer, if the other Side are thereby delayed; and if the Infant *A.* does not immediately after his coming of Age apply to the Court in order to retract his Offer, and amend his Anſwer. Decreed between *Cecil* and the *Earl* of *Salisbury*, 2 *Vern.* 224.

5. If an Infant borrows a Sum of Money, for which he gives a Bond, and deviſes his Perſonal Eſtate (being of ſufficient Capacity)

for the Payment of his Debts, particularly thoſe he had ſet his Hand to, this Bond-Debt ſhall be paid. Decreed 1651. between *Hampſon* and Lady *Sydenham*, *Nel. Chan. Rep.* 8*vo.* 55.

6. If an Infant Executor aſſents to a Legacy, ſuch Aſſent (*a*) ſhall be good, if there are ſufficient Aſſets beſides to pay Debts; *ſecus* not. *Per* Lord Keeper *Finch*, 1 *Chan. Ca.* 256.

(*a*) An Infant Executor, before ſeventeen Years of Age, cannot bind himſelf by his Aſſent to a Legacy. 5 *Rep.* 29. *Cro. Eliz.* 719.

7. An Infant may adminiſter at ſeventeen, but cannot commit a *Devaſtavit* till he is of (*b*) full Age. *Per North* Lord Keeper, 1 *Vern.* 328.

(*b*) Where an Infant is made Executor, Adminiſtration muſt be granted *cum Teſtamento annexo* to his Guardian, or next Friend, *durante Minoritate*; but the Adminiſtration ceaſes when the Infant is ſeventeen Years of Age; ſo if an Infant Executrix, before ſeventeen Years of Age, taketh a Husband of full Age, the Adminiſtration preſently ceaſeth. 5 *Rep.* 29. 6 *Rep.* 67. 2 *Inſt.* 398. But if an Infant is intitled to an Adminiſtration of the Goods of an Inteſtate, Adminiſtration ſhall be granted to another till he is twenty-one; becauſe a *Minor* cannot enter into a Bond, with Sureties, to adminiſter faithfully, as reqired by the 22 & 23 *Car.* 2.

8. An Infant Female may make a Will, and diſpoſe of her Perſonal Eſtate at Twelve; an Infant Male at ſeventeen, or at fifteen, if proved to be of Diſcretion; agreed in the Caſe of *Biſhop* and *Sharp*, 2 *Vern.* 469. by the Civil Law at fourteen; and this Age is now admitted of in Chancery.

9. An Infant may be a (*c*) Truſtee. 2 *Vern.* 561.

(*c*) And by the 7 *Ann. cap.* 19. Infants ſeiſed or poſſeſſed of Eſtates in Fee in Truſt, or in Mortgage, are enabled to make Conveyances of ſuch Eſtates.

10. In this Caſe it was urged, that by the Cuſtom of Merchants, Infants were compellable to account as Factors; but the Court held, that tho' an Infant may be an Executor, and ſhall be charged, becauſe the Law enables him; ſo he may be charged in Trover, becauſe a Tort; yet neither on a Contract, nor as Bailiff, nor for Goods to carry on a Trade, can he be charged; and therefore when they are made Factors, Security ought to be taken from their Friends, for their Accounting. *Trin.* 1700. between *Smally* and *Smally*.

11. *A.* having married an Heireſs, who was but eighteen Years of Age, and ſhe being with Child, *A.* petitioned the King, that he would be pleaſed by *Privy Seal* to direct his Juſtices of the *Common Pleas* to take a Fine or Common Recovery, ſo that the Petitioner may be ſure of an Eſtate for Life in the Premiſſes. The King in Anſwer ſaid, that he was ſatisfied of the Petitioner's Merit, but referred it to the Lord Chancellor, to report what was fitting to be done therein; who, upon hearing Counſel, declared he thought the Petition reaſonable, and that he would report the ſame to the King accordingly. Sir *Humphry Mackworth's* Caſe, 1 *Vern.* 461. *Note*; Serj. *Maynard* obſerved, that the Petition was inartificially drawn, in praying, that a Fine or Common Recovery may be taken, for that a Fine cannot be taken from an Infant, but a (*d*) Recovery may, by the King's ſpecial Direction.

(*d*) An Infant, either by himſelf, or Guardian, cannot ſuffer a Common Recovery; but if he obtains a Privy Seal for that Purpoſe, he may ſuffer a Recovery. 10 *Rep.* 43. Where ſuch Recoveries have been, *vide Hob.* 199. *Cro. Car.* 307. 1 *Rol. Abr.* 731. And *vide* 2 *Salk.* 567. where *J. S.* being of the Age of nineteen Years, his Siſter, who was the next in Remainder, and alſo his Heir, married one of his Footmen, and he petitioned the King for Leave to ſuffer a Common Recovery, who referred it to the Judges of the Common Pleas, before whom ſeveral Precedents of Recoveries ſuffered by Infants upon Privy Seals, were cited; but the Judges having obſerved, that ſeven of the Petitions were by Fathers, upon the Marriage of their Sons, and an equal Recompence given; and that here was neither Father nor Marriage in the Caſe; they diſallowed it, and ſaid, that this Matter had been carried too far already.

CAP. XXXV.

# CAP. XXXV.

# Injunction.

(A) Injunctions, in what Caſes, and when to be granted.

(B) What ſhall be a Breach thereof.

## (A) Injunctions, in what Caſes, and when to be granted.

1. A Truſtee having contracted to ſell an Eſtate to one Perſon, and the *Ceſtui que* having actually ſold it to another, who moved for an (*a*) Injunction to quiet him in the Poſſeſſion, being diſturbed by the Truſtee; it was held by my Lord *Keeper*, that an Injunction for Quieting the Poſſeſſion, is only grantable where the Plaintiff has been in Poſſeſſion for the Space of three Years before the Bill exhibited, upon a Title yet undetermined; or in Caſe the Cauſe hath been heard, and Judgment paſſed upon the Merits of the Cauſe by the Court. Lady *Poines*'s Caſe, 1 *Vern.* 156.

(*a*) Injunctions to ſtay Waſte, *vide* Title *Waſte*; Injunctions to ſtay Proceedings at Law, *vide* Title *Courts, and their Juriſdiction.* That Chancery will not grant an Injunction, unleſs a Right appears, *vide* 1 *Vern.* 127. 2 *Chan. Ca.* 165. 1 *Vern.* 276, 120. will grant a perpetual Injunction, *vid.* 2 *Chan. Ca.* 80. 1 *Chan. Ca.* 75. 2 *Chan. Ca.* 165.

2. If a Perſon is ſued at Law for irregularly ſerving the Proceſs of this Court, an Injunction will be granted to ſtay the Proceedings at Law, for the Irregularity is only puniſhable in this Court. 1 *Vern.* 269.

3. An Injunction is never to be granted before a Bill filed. 4 *Inſt.* 92. *vide* 1 *Vern.* 156. where it is ſaid, that the Defendant cannot have an Injunction, becauſe he has no Bill filed.

4. But where a Mortgagee brought a Bill to foreclоſe, and pending the Suit, an Advowſon appendant to the mortgaged Manor became void; and the Mortgagee being hindered from Preſenting brought his *Quare Impedit*; and the Court granted an Injunction on the Defendant's Application, tho' he had no Bill filed. 2 *Vern.* 401.

5. So where a Cauſe abated by the Death of the Lady *Gerrard* and the Defendant was her Executor, who being ſerved with a Copy of the Bill of Revivor, and my Lord *Keeper*'s Letter, would not appear, being in Privilege; and upon Motion an Injunction was granted, tho' the Cauſe was not revived; and the Caſe of *Armſtrong* and *Jackſon* was cited, where, before a Demurrer determined, the Plaintiff had an Injunction on Motion. *Trin.* 1700. between the Duke of *Hamilton* and the Earl of *Macclesfield*.

6. So where the Lord *Wharton* had an Injunction to quiet him in the Poſſeſſion of the Mines in Queſtion; and upon Hearing of the Cauſe, an Iſſue was directed, to try whether the Mines in Queſtion were within the Plaintiff's or Defendant's Manor; the Iſſue was tried at Bar, and found for the Plaintiff; then the Plaintiff died, and a Bill of Revivor was brought; and before the Time for Anſwering was out, or the Cauſe revived, the Plaintiffs moved for an Injunction to ſtay the Lord *Wharton*'s Working the Mines, having Affidavits, that ſince the Verdict againſt him, he had trebled the Number of Workmen, and between that and *Candlemas* would work out the Mines; and an Injunction was granted, tho' the Cauſe was not revived. *Mich.* 1702. between *Robinſon* and Lord *Wharton*.

## (B) What ſhall be a Breach thereof.

1. IF there be a Suit in Equity concerning Title to a Cloſe, and thereupon an Order is made, that the Defendant ſhall ſuffer the Plaintiff to enjoy the Cloſe, till, *&c.* and notwithſtanding the Defendant, upon a Title of Common, puts in his Cattle; this is no Breach of the Injunction, for the Common was not in Queſtion by the Bill. *Hill.* 8 *Jac.* 1. *Bent*'s Caſe, *Lane* 96.

2. In this Caſe, the Queſtion was, whether the Plaintiff was intitled to Relief for meſne Profits received by the Defendant whilſt a Cauſe was pending in this Court; and the Defendants had an Injunction; and my Lord *Keeper* held he was not intitled, but from the Time of Entry; for if the Plaintiff entered, he might recover at Law, and the Injunction did not prevent his Entry. 2 *Vern.* 519.

# CAP. XXXVI.

## Intereſt Money.

(A) What Debt ſhall carry Intereſt, and from what Time.

(B) Where there may be Intereſt upon Intereſt.

(C) Where the Intereſt may exceed the Penalty.

(D) How Debts, contracted before the Statutes that reſtrain Uſury, ſhall carry Intereſt.

(E) What Intereſt a Debt contracted in a Foreign Country ſhall carry here.

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### (A) What Debt ſhall carry Intereſt, and from what Time.

1. IF *A.* gives a Legacy to his Grandaughter an Infant, to be paid at ſuch Time, and in ſuch Manner as his Wife, who was his Executrix, ſhould think fit and beſt for his Grandaughter; and the Executrix lives near twenty Years, and dies without paying the Legacy; the Legacy ſhall be paid with Intereſt from the Death of *A.* tho' there was no Demand made of it in the Life of the Executrix. Decreed *Trin.* 1684. between *Churchil* and Lady *Speake*, 1 *Vern.* 251. a Legacy payable at a certain Day, ſhall carry Intereſt from the Time of Payment. 1 *Vern.* 262. but *Quære*, whether there muſt not be a Demand; for,

2. Where a Legacy was deviſed to *J. S.* to be paid at a certain Time, yet it was held, that it ſhould not carry Intereſt, but from the Time of a Demand made; tho' otherwiſe of a Debt. *Paſch.* 1701. between *Joliff* and *Crew*, and *vide* 2 *Salk.* 415. where it was held *per Cowper* Lord Chancellor, that in Caſe of a Perſon of full Age, he ſhall not have Intereſt but from the Time of Demand; *ſecus* of an Infant, becauſe Laches ſhall not be imputed to him.

3. If a Mortgage is forfeited, and the Mortgagor meets the Mortgagee, and ſays to him, *I have Money now, I will come and redeem the Mortgage*; and the Mortgagee replies, that *he would hold the*

*mortgaged Premiſſes as long as he could, and when he could hold them no longer, let the Devil take them if he would.* And afterwards the Mortgagor goes to the Mortgagee's Houſe with Money, more than ſufficient to redeem the Mortgage, and tenders it there; but it does not appear, that the * Tender was to the Mortgagee, or that he was within; yet a Redemption will be decreed, and the Mortgagee ſhall have no Intereſt from the Time of the Tender, becauſe of his Wilfulneſs. Decreed *Mich.* 15 *Car.* 2. between *Manning* and *Burges*, 1 *Chan. Ca.* 29. and a like Caſe ſaid to be between *Peckham* and *Legay*, about a Year before.

* But for this, *vide* Title *Mortgages*, Letter (D).

## (B) Where there may be Intereſt upon Intereſt.

1. *J. S.* mortgaged his Eſtate to the Plaintiff, and died, leaving the Defendant his Daughter and Heir, who was an Infant, and had nothing to ſubſiſt on, but the Rents of the mortgaged Eſtate; and the Intereſt being ſuffered to run in Arrear three Years and a Half, the Plaintiff grew uneaſy at it, and threatened to enter on the Eſtate, unleſs his Intereſt might be made Principal; upon which the Defendant's Mother, with the Privity of her neareſt Relations, ſtated the Account, and the Defendant herſelf (who was then near of Age) ſigned it; and the Account being admitted to be fair, it was held by my Lord Chancellor, that tho' regularly Intereſt ſhall not carry Intereſt, yet that in ſome Caſes, and upon ſome Circumſtances, it would be Injuſtice, if Intereſt ſhould not be made Principal; and the rather in this Caſe, becauſe it was for the Infant's Benefit, who, without this Agreement, would have been deſtitute of Subſiſtence. Decreed *Paſch.* 1699. between the Earl of *Cheſterfield* and Lady *Cromwell*, and affirmed by my Lord Keeper *Wright*, *Mich.* 1701.

2. If a Mortgagee aſſigns over the Mortgage, all the Money due to the Mortgagee for Principal and Intereſt being paid by the Aſſignee, the Intereſt ſhall be accounted Principal in the Hands of the Aſſignee, but the Account between him and the Mortgagee ſhall not conclude the Mortgagor; neither ſhall the Intereſt be accounted Principal, unleſs there was a fair and actual Aſſignment, and the Money really paid. *Paſch.* 17 *Car.* 2. between *Smith* and *Pemberton*, 1 *Chan. Ca.* 67. *vide* 1 *Chan. Ca.* 258. *S. P. per* Lord *Keeper*, and by him ſaid to be the conſtant Rule in Equity; and that there was not a Caſe to contradict it, except that of *Porter* and *Hobart* in Lord *Shaftsbury*'s Time; *vide* 1 *Vern.* 168, 169. *S. P.* where my Lord *Keeper* ſaid, that he thought it reaſonable that the Intereſt ſhould carry Intereſt with Reſpect to an Aſſignee; and that tho' it was reſolved otherwiſe in the Houſe of Lords, in the Caſe of *Porter and Hobart*; yet it was on Account of the particular Hardſhips which attended that Caſe in all its Circumſtances.

3. If *A.* mortgages for 450 *l.* payable at the End of five Years, with Intereſt at 5 *l. per Cent.* in the mean Time; and about two Months before the End of the five Years, the Mortgagee aſſigns over the Mortgage for 560 *l.* being the Principal and Intereſt then due; the 560 *l.* ſhall carry Intereſt, tho' the five Years were not elapſed; the Mortgage being forfeited by the Non-payment of Intereſt. Decreed *Hill.* 1690. between *Gladman* and *Henchman*, 2 *Vern.* 135. *vide* 1 *Chan.*

1 *Chan. Ca.* 258. where it was declared by my Lord *Chancellor*, that it ſhould be a Rule, that a Mortgagee (the Mortgage being forfeited) ſhould have Intereſt for Intereſt; but *Q.*

## (C) Where the Intereſt may exceed the Penalty.

1. IF one by Will or Deed ſubject his Lands for the Payment of his Debts, and there is a Debt due by Bond, the Intereſt of which hath out-run the Penalty, yet it ſhall not carry Intereſt beyond the Penalty; for the Deſign of ſubjecting the Lands was not to increaſe the Debt, but to give a farther Security; but if the Deviſee or Truſtee neglects to pay in a reaſonable Time, he ſhall, after ſuch Neglect, pay Intereſt beyond the (*a*) Penalty; *per Cowper* Lord *Chancellor*, 1 *Salk.* 154.

(*a*) Tho' it be the regular Practice in Equity, as well as at Law, that an Obligor ſhould not pay more than the Penalty of the Bond, the Obligee having choſen his own Security, and made himſelf Judge. *Vide* 1 *Vern.* 342. 2 *Vern.* 509. Yet a Court of Equity will ſometimes extend the Debt beyond the Penalty; as where the Obligee has been delayed by Injunction; *vide* 1 *Vern.* 350. ſo if delayed by Privilege of Parliament; *vide Show. P. C.* 15. but *Note*; a Diverſity is often taken, where the Obligee and where the Obligor ſues in Equity: For in the laſt Caſe the Court will ſometimes, upon relieving againſt the Penalty, decree Principal and Intereſt, tho' the Intereſt exceed the Penalty, purſuant to that Rule, that *He, who would have Equity done him, muſt do it to others.* And this ſeems to be the Reaſon, why an Obligee ſhall have Intereſt, after he has entered up Judgment; for tho' in Strictneſs, it may be accounted his own Fault, why he did not take out Execution; yet as by the Judgment he is intitled to the Penalty, it does not ſeem reaſonable that he ſhould be deprived of it, but upon paying him principal and the Intereſt, which incurred as well before as after the Entring up of the Judgment.

## (D) How Debts, contracted before the Statutes that reſtrain Uſury, ſhall carry Intereſt.

1. IF a Mortgagee receives Intereſt upon an old Mortgage, after the Rate of 8 *l. per Cent.* after ſuch Time as the Intereſt is reduced to 6 *l. per Cent.* by the Statute, yet he ſhall not be obliged to allow or diſcount the 2 *l. per Cent.* towards Satisfaction of the Principal. Decreed *Trin.* 1688. between *Walker* and *Penrie*, 2 *Vern.* 78. 2 *Vern.* 145. *S. C.* where upon a Bill of Review, *Rawlinſon* and *Hutchins*, Lords Commiſſioners, held the Decree ſhould be reverſed, againſt Lord *Trevor*; but it ſeems to be now ſettled, that the Statute of 12 *Ann. cap.* 16. which reduces the Intereſt of the Money to 5 *l. per Cent.* has not a Retroſpect to any Debts contracted before, but that they ſhall carry Intereſt according to the Intereſt allowed, or Agreement made at the Time the Debt was contracted.

## (E) What Intereſt a Debt contracted in a Foreign Country ſhall carry here.

1. *J. S.* contracted a Debt in *Ireland*, for which he gave a Bond, and coming into *England* he was arreſted here for the Debt; and having brought a Bill for Relief, he inſiſted among other Things, that he ſhould not be obliged to pay *Iriſh* Intereſt, the Money being now to be paid here; but the Court held, that he muſt pay *Iriſh* Intereſt, and that in all Caſes Intereſt muſt be paid

according to the Law of the Country where the Debt was contracted, and not according to that where the Debt is ſued for; but held it reaſonable, as the Money was now to be paid here, that the Plaintiff ſhould have an Allowance for the Return of it out of *Ireland*, *Trin.* 1702. between the Earl of *Dungannon* and *Hackett*, and ſeveral Precedents were cited to this Purpoſe, as the Caſe of *Lane* and *Nichols*, in which *Turkiſh* Intereſt was allowed on a Contract made there, tho' both Parties had been long in *England*; ſo *Indian* Intereſt was allowed on a Contract made there between *Harvey* and the *Eaſt-India* Company; and a Caſe on the Earl of *Donegall's* Will, who living in *England* deviſed a Rent-charge out of his Eſtate in *Ireland*; and it was held that it ſhould be according to the *Engliſh* Value, the Will being made here.

2. If a Debt be contracted in *Ireland*, and a Bond given for ſecuring of it in *England*, it ſhall carry *Engliſh* Intereſt, *Mich.* 1700. between L. *Ranelaugh* and Sir *John Champant*, 2 *Vern.* 395. but *Quære* of this Report; for it appears, that Sir *John Champant* was Deputy-Receiver to L. *Ranelaugh*, who was Vice-Treaſurer of *Ireland*; and that he had accepted and paid ſeveral Bills drawn on him by my Lord from *England*, amounting to a great deal more than the Fees and Profits of his Place; and that my Lord ſent him over a Bond for the Overplus payable there; and it was held, that this Bond on a Suit here, ſhould carry *Iriſh* Intereſt.

3. The Plaintiff being a Merchant, had Sugars due to him in *Nevis* on Bond, with Intereſt at 10 *l. per Cent.* being the common Intereſt of the Country; he intruſted one *J. S.* his Agent there, to receive thoſe Sugars, and to return them hither. *J. S.* receives the Sugars, but never returns them, but dies, leaving the Defendant his Executor, againſt whom the Plaintiff brought his Bill; and tho' it was urged, that *J. S.* being an Attorney, ſhould be excuſed from Intereſt, or at moſt ſhould only pay the Intereſt this Country allows; yet it was held, that the Defendant ſhould pay 10 *l. per Cent.* Intereſt, and that *J. S.*'s being only an Agent or Attorney, did not excuſe him, becauſe he had misbehaved himſelf. *Trin.* 1701. between *Ellis* and *Loyd*.

# CAP. XXXVII.

# Jointenants, and Tenants in Common.

(A) What ſhall be a Jointenancy, and not a Tenancy in Common.

(B) What ſhall amount to a Severance of the Jointenancy.

## (A) What ſhall be a Jointenancy, and not a Tenancy in Common.

1. IF two Perſons advance a Sum of Money by Way of Mortgage, and take the Mortgage to themſelves jointly, and one of them dies; when the Money comes to be paid, the Survivor ſhall not have the Whole, but the Repreſentative of him who is dead ſhall have a Proportion. Decreed 7 *Car.* 1. between *Petty* and *Styward*, 1 *Chan. Rep.* 57. *Sed v. Mr. Cook.*

2. But if two take a Leaſe jointly of a Farm, the Leaſe ſhall ſurvive; but the Stock on the Farm, though occupied jointly, ſhall not ſurvive; neither ſhall a Stock uſed in a joint Undertaking in the Way of Trade ſurvive; and therefore not neceſſary in Articles of Copartnerſhip to provide againſt it; *per* Lord Keeper. *Hill.* 1683. between *Jefferies* and *Small*, 1 *Vern.* 217. And *per* Lord *Keeper*, where Survivorſhip is to take Place, is where Two become intereſted by Way of Gift, or the like. *Vide* 1 *Vern.* 33, 361. whether if Two joint Purchaſers pay Share and Share alike for a Purchaſe, and one dies, the Whole ſhall ſurvive.

3. The Commiſſioners of Sewers had ſold and conveyed Lands to five Perſons and their Heirs, who afterwards, in Order to improve and cultivate theſe Lands, entred into Articles, whereby they agreed to be equally concerned as to Profit and Loſs, and to advance each of them ſuch a Sum, to be laid out in the Manurance and Improvement of the Land; and it was held, that they were Tenants in Common, and not Jointenants, as to the beneficial Intereſt or Right in theſe Lands, and that the Survivor ſhould not go away with the

Whole, for then it might happen that ſome might have paid, or laid out their Share of the Money; and others, who had laid out nothing, go away with the whole Eſtate. Decreed at the *Rolls*, *Trin.* 1729. between *Lake* and *Gibſon:* And his *Honour* held, that where Two, or more, purchaſe Lands, and advance the Money in equal Proportions, and take a Conveyance to them and their Heirs, that this is a Jointenancy, that is, a Purchaſe by them jointly of the Chance of Survivorſhip, which may happen to the one of them as well as to the other; but where the Proportions of the Money are not equal, and this appears in the Deed it ſelf, this makes them in the Nature of Partners; and however the legal Eſtate may ſurvive, yet the Survivor ſhall be conſidered but as a Truſtee for the others, in Proportion to the Sums advanced by each of them. So if Two, or more, make a joint Purchaſe, and afterwards one of them lays out a conſiderable Sum of Money in Repairs or Improvements, and dies, this ſhall be a Lien on the Land, and a Truſt for the Repreſentative of him who advanced it; and that in all other Caſes of a joint Undertaking or Partnerſhip, either in Trade, or any other Dealing, they were to be conſidered as Tenants in Common, or the Survivors as Truſtees for thoſe who were dead.

4. If a Man covenants to ſtand ſeiſed to the Uſe of *A.* for Life, and after to Two, equally to be divided, and to their Heirs and Aſſigns for ever, the Inheritance ſhall be in (*a*) Common, as well as the Eſtate for Life; and there is no Difference where it is to Two, equally divided, and where to Two, equally to be divided. 2 *Vent.* 365, 366. *vide Show. P. C.* 210. where it is admitted, that there is no Difference between *divided* and *to be divided*; and that Diſtinction is now exploded.

(*a*) Copyhold Lands were ſurrendered to the Uſe of *A. B.* and *C.* and their Heirs, equally to be divided between them and their Heirs reſpectively; and *Gould* and *Turton* Juſtices held it a Tenancy in Common, by Reaſon of the apparent Intent of the Parties; but *Holt* Ch. Juſt. held it a Jointenancy, and that the Word *equally*, imported no more than to have alike; and as to the Word *divided*, he held, that did not import a Tenancy in Common, for their Poſſeſſion muſt be intire, *& pro indiviſo*; to divide would be to deſtroy it; and it is ſtrange to create an Eſtate from a Word which implies only, what would deſtroy it. 1 *Salk.* 391. But the ſame Caſe being cited *Mich.* 1730. in the Caſe of *Stringer* and *Phillips*, was ſaid by Counſel to be reverſed, according to my Lord *Holt*'s Opinion; in which Caſe it was held by the Maſter of the *Rolls*, that there was a Difference between Words which create a Tenancy in Common in a Will and in a Conveyance; for that though the Words, *equally to be divided*, in a Will, create a Tenancy in Common; yet it is not by Force of the Words *themſelves*, but by the Intent of the Teſtator, that there ſhould be no Survivorſhip; and he ſaid there were but two Ways of creating a Tenancy in Common by Conveyance, *viz.* either by limiting it to them expreſly as Tenants in Common, or elſe by limiting a Moiety, or a Third, or other undivided Part, to one; and the other Moiety, or Third, to another, *&c.* for if otherwiſe, though the Words, *equally divided*, be uſed; yet they ſhall ſignify only an equal Diviſion and Proportion of the Profits.

5. If a Man conveys his Houſe and four *Farms* to Truſtees, upon Truſt that his two Siſters might cohabit in the Capital Houſe, and equally divide the Rents and Profits of the four Farms betwixt them, and the Whole to the Survivor of them, this ſhall be a Jointenancy. Decreed *Mich.* 1694. between *Clerk* and *Clerk*, 2 *Vern.* 323. for although the Words, *equally to be divided betwixt them*, do ſometimes in a Will make a Tenancy in Common; yet it is only by Way of (*b*) Conſtruction.

(*b*) If a Man deviſes Lands to his two Sons and their Heirs for ever, and the longer Liver of them, to be equally divided between them after his Wife's Death; this ſhall be a Tenancy in Common in the Sons; adjudged 3 *Lev.* 373. by three Judges againſt one; and that the latter Words being in a Will ſhall controul the former.

6 If

6. If *A.* deviſes Lands to Truſtees and their Heirs, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter, during the Wife's Life; and after her Death he deviſes the ſame to the Uſe of his Daughter in Tail, with Remainders over, and the Daughter dies during the Mother's Life; this being a Tenancy in Common ſhall go to the Adminiſtrator of the Daughter, during the Mother's Life, and ſhall not be a reſulting Truſt for the Benefit of the Heir. Decreed *Mich.* 1701. between *Phillips* and *Phillips*, 2 *Vern.* 430. *vide* 1 *Vern.* 65. where the Words, *equally to be divided*, was decreed a Tenancy in Common.

7. *J. S.* deviſed a Term for Years, and all her Intereſt therein, to her two Daughters, they paying yearly to her Son 25 *l.* by quarterly Payments, *viz.* each of them 12 *l.* 10 *s.* yearly, out of the Rents of the Premiſſes, during his Life, if the Term ſo long continued; and my Lord Chancellor held it clearly to be a Tenancy in Common, the 25 *l.* being to be paid by the two Daughters equally, in Moieties. *Mich.* 1685. between *Kew* and *Rouſe*, 1 *Vern.* 353.

8. If *J. S.* directs by Will, that 240 *l.* ſhall be laid out in the Purchaſe of Lands, and ſettled on *M.* and the Heirs of her Body; and if ſhe die without Iſſue, then on the Children of *E.* which ſhe ſhould leave behind her, and *M.* dies without Iſſue, before any Purchaſe had, and afterwards the Truſtees lay out the Money in a Purchaſe, and convey the Lands to the two Children of *E.* and their Heirs who hold it for ſeveral Years, and then one of them dies; the Survivor ſhall not have the Lands. Decreed *Paſch.* 1688. between *Saunders* and *Browne*, 2 *Vern.* 46. 3 *Chan. Rep.* 214. *S. C.* reported contrary, and there ſaid, that if the Money had not been inveſted in a Purchaſe, it would not ſurvive. *Vide* 2 *Vern.* 556. where it is held, that Survivorſhip muſt take Place as well in Equity as at Law.

9. A Man having a Mortgage for Years makes his Will, and thereby deviſes all his Perſonal Eſtate, of what Nature ſoever, to his Executors, in Truſt for the Payment of his Debts, and afterwards deviſes the Reſidue and Overplus of his ſaid Perſonal Eſtate to his two Daughters, equally to be divided between them, and dies; the Debts being ſatisfied, the Daughters contract with the Mortgagor for the Purchaſe of the Equity of Redemption to them and their Heirs; one of the Daughters deviſes her Share and Intereſt to the Plaintiff, and dies; and it was held that this Purchaſe of the Equity of Redemption and Inheritance was a Tenancy in Common, the Mortgage deviſed to the two Daughters being ſo, and this Purchaſe being founded on the ſaid Mortgage. Decreed *Paſch.* 11 *Ann.* between *Edwards* and *Faſhion*.

10. *J. S.* deviſed his Leaſehold Houſe to his Wife for Life, and after her Death, he deviſed it to *A.* and her three Sons, equally amongſt them; and it was decreed, that they took it as Tenants in Common, though there was no Mention of any Diviſion to be made. *Paſch.* 1718. between *Warner* and *Hone*.

11. One deviſed 100 *l.* to Five, equally to be divided between them and the Survivors and Survivor of them; and if *A.* (one of the Five) died before Marriage, her Share to go over to another Perſon; and it was decreed, that they took this 100 *l.* as Tenants in Common, and that the Words, *and the Survivors and Survivor of them*, to make them Jointenants, would be a Contradiction to the firſt Words, whereby they were made Tenants in Common, and that they ſhould

be conſtrued to extend only to ſuch who were ſurvivors at the Death of the Teſtator, and therefore inſerted to prevent a Lapſe; and this is the Stronger, by the Limitation over of *A.*'s Share upon a Contingency, by which it is plain, the Teſtator did not intend her to be a Jointenant with the Reſt; and as the Deviſe was to all Five, they muſt all take alike; and not *A.* to be Tenant in Common, and the other four Jointenants. *Mich.* 1730. at the *Rolls*, between *Stringer* and *Phillips*.

## (B) What ſhall amount to a Severance of the Jointenancy.

1. THree Perſons being jointly intereſted in the Truſt of a Term for Years, one of them mortgaged his third Part; and the Queſtion was, whether the Jointenancy was ſevered; and though it was admitted to he a ſettled Point in Chancery, that if one deviſes his Lands in Fee, and afterwards mortgages them to another in Fee, that it is but a Revocation *pro tanto* only; yet my Lord *Cowper* held that this was not like the Caſe of a Will, in which it may be for the Mortgagor's Advantage, not to have it conſtrued a Revocation; but that in the Caſe of a Jointenancy, which is a Thing (*a*) odious in Equity, it would be a Diſadvantage to the Mortgagor not to have it conſtrued a Severance; for if he ſhould die firſt, all muſt go from his Repreſentative to the Survivor. *Mich.* 8 *Ann.* between *York* and *Stone*, 1 *Salk.* 158.

(*a*) Jointenancy (of an Inheritance) is to be favoured, for the Law loves not to divide and multiply Tenures. *Per Holt* Ch. Juſt. 1 *Salk.* 392.

2. The Plaintiff's Husband and Defendant had enjoyed a Church-Leaſe in Moieties under an Agreement, that there ſhould be no Benefit of Survivorſhip; but upon the laſt Renewal the Leaſe was taken in both their Names, and no expreſs Agreement againſt Survivorſhip; the Plaintiff's Husband falling ſick, by Deed aſſigned his Moiety of the Leaſe to his Wife, and by his Will deviſed it to her; and there being no Proof of the Agreement, and the Grant to the Wife being void; it was decreed, that the Will could not ſever the Jointenancy. *Mich.* 1700. between *Moyſe* and *Gyles*, 2 *Vern.* 385.

3. If *A.* and *B.* are Jointenants, and *A.* makes a Leaſe for Years of his Moiety, to commence upon his Death, if *B.* ſhall ſo long live; this is a Severance of the Jointenancy, and the Leaſe will bind *B.* if he ſurvives. 2 *Vern.* 323.

4. If one Jointenant agrees to alien, and does it not, but dies; this will not ſever the Jointenancy, nor bind the Survivor. 2 *Vern.* 63.

# CAP. XXXVIII.

## Legacies.

(A) Of vested or lapsed Legacies, being to be paid at a future Time or certain Age, to which the Legatees never arrived.

(B) Of a lapsed Legacy, by the Legatee's Dying in the Life-time of the Testator, and here, in what Cases it shall be good, and vest in another Person, to whom it is limited over.

(C) Of specifick and pecuniary Legacies, and here of Abating and Refunding.

(D) Of the Time of Payment of a Legacy.

(E) To whom to be paid.

(F) Where Legatees shall have Interest and Maintenance.

(G) Ademption of a Legacy.

Of Devises of Things Personal, to whom, and by what Description good, and where it shall be in Satisfaction, *vid.* Title *Devise*. Legacies given upon Condition, *vid.* Title *Conditions and Limitations*; and *vid.* Title *Remainder*, for Legacies limited over.

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### (A) Of vested or lapsed Legacies being to be paid at a future Time or certain Age, to which the Legatees never arrived.

1. IF a Sum of Money is bequeathed to one of the Age of twenty-one Years, or Day of Marriage, to be paid to him with Interest, and he dies before either, yet the Money shall go to his Executor. 29 *Car.* 2. *Clobberie's* Case, 2 *Vent.* 342. 2 *Chan. Ca.* 155. *S. C.* 2 *Salk.* 415. *S. C.* cited. 2 *Vern.* 673. *S. C.* cited.



1. But

2. But if Money is bequeathed to one at his Age of twenty-one Years, and he dies before that Age, the Money is (a) loſt. 2 *Chan. Ca.* 155. 2 *Salk.* 415. *S. P.*

(a) The Rule and Diſtinction in theſe Caſes is agreeable to the Civil Law, which is, that if a Legacy be deviſed to one generally, to be paid or payable at the Age of Twenty-one, or any other Age, and the Legatee dies before that Age; yet this is ſuch an Intereſt veſted in the Legatee, that his Executor or Adminiſtrator may ſue for and recover it; for it is *debitum in præſenti*, though *ſolvendum in futuro*, the Time being annexed to the Payment, and not to the Legacy itſelf; ſo if the Legacy is made to carry Intereſt, tho' the Words, *to be paid*, or *payable*, are omitted, it ſhall be an Intereſt veſted. But if a Legacy be deviſed to one at Twenty-one, or if, or when he ſhall attain the Age of Twenty-one, and the Legatee dies before that Age, the Legacy is lapſed. *Dyer* 59. 1 *Leon.* 177. *Off. Exec.* 347. *Swinb.* 311, 312. *Vid.* 2 *Vern.* 416. where my Lord Keeper *Wright* was of Opinion, that there was no Foundation for this Diſtinction, and that the Teſtator's Intention was equal in both Caſes; but *note*; that was in a Caſe wherein the Legacy was to ariſe out of the Real Eſtate; which by the better Authorities, ſhall not go to the Repreſentative of the Legatee, but ſhall ſink in the Inheritance, for the Benefit of the Heir, as much as if it were a Portion provided by a Marriage-Settlement; for which *vid.* Title *Heir*, and 2 *Vern.* 92, 617, 508, and 2 *Vent.* *Pawlet* and *Pawlet*; but when it was to be paid out of the Perſonal Eſtate, the above Diſtinction has been allowed of, as well before, as by all the ſubſequent Chancellors; and my Lord *Cowper* ſaid, that tho' it was at firſt introduced upon very ſlender Reaſons, and probably upon no other, but from a conſtant Willingneſs in the Civil Law, to ſtretch in Favour of a particular Legatee againſt the Reſiduary Legatee, who went away with the whole Surplus of the Perſonal Eſtate; yet as Chancery has now a Concurrent Juriſdiction with the Spiritual Court in Matters of this Nature, he thought it highly reaſonable, that there ſhould be a Conformity in their Reſolutions, that the Subject might have the ſame Meaſure of Juſtice in which Court ſoever he ſued.

3. If a Portion is deviſed to a Child, with Intereſt, but not to be paid, or payable, until the Child attain twenty-one Years, or was married; and the Child dies under twenty-one Years, and unmarried; yet the Portion ſhall go to the Adminiſtrator of the Infant. *Trin.* 1687. between *Collins* and *Metcalf*, 1 *Vern.* 462. decreed.

4. So if a Legacy of 50 *l.* is deviſed to *J. S.* when of the Age of ſixteen Years, and Intereſt in the mean Time to be paid quarterly; this is a Legacy veſted, becauſe it carries Intereſt. *Mich.* 1711. between *Stapleton* and *Cheele*, 2 *Vern.* 673. decreed.

5. But if *A.* deviſes in theſe Words, *viz. I give* 100 l. *a-piece to the two Children of* J. S. *at the End of ten Years after my Deceaſe*, and the Children die within the ten Years, this is a lapſed Legacy, and is ſo in all Caſes where the Time is annexed to the Legacy itſelf, and not to the Payment of it. Between *Snell* and *Dee*, 2 *Salk.* 415. *per Cowper* Lord *Chancellor*; though it was objected, that this differed from the Caſe, where a Man deviſes 100 *l.* to *J. S.* at his Age of Twenty-one, becauſe it is a Contingency, whether he will attain to that Age; but the Expiration of the ten Years is inevitable.

6. So where one being poſſeſſed of a very conſiderable Perſonal Eſtate, Part in *Jamaica*, and Part in *England*, and being himſelf reſiding in *Jamaica* made his Will, and thereof ſeveral Executors, ſome for his Eſtate in *Jamaica*, and others reſiding in *England*, for his Eſtate here, and amongſt other Things deviſed in theſe Words, *viz. I give and bequeath to* J. S. *now under the Cuſtody of* R. D. *the Sum of* 2000 l. *at the Age of twenty-one Years, to be paid by my Executors in* England, and deviſed all the Reſt and Reſidue of his Eſtate to the Plaintiff, and died; *J. S.* having attained his Age of Eighteen made his Will, and thereby deviſed this Legacy, and all his Eſtate, to the Defendant; and my Lord *Chancellor* held this a lapſed Legacy, and that it was a vain Endeavour in the Defendant's Counſel to conſtrue it a preſent Legacy, and therefore veſted by the Word *Now*, becauſe it was a plain Deſcription of the Condition of

of the Legatee, *viz.* *Now* under the Cuſtody of, *&c.* for otherwiſe they muſt ſtop at *Now*, which would be playing with the Words; and though the Word *paid*, was made Uſe of, yet it was plainly intended a Deſignation of the Perſons by whom the Legacy was to be paid, *viz.* by his Executors in *England*, which was proper, he having two Sets of them. *Trin.* 1710. between *Onſlow* and *South* decreed.

## (B) Of a lapſed Legacy, by the Legatee's Dying in the Life-time of the Teſtator; and here, in what Caſes it ſhall be good, and veſt in another to whom it is limited over.

1. *A.* By Will, reciting, that *B.* owed him 400 *l.* gave and bequeathed that 400 *l.* to him, provided he, out of the 400 *l.* paid ſeveral Sums in the Will mentioned, to his Wife and Children, and the Reſt and Reſidue he freely and abſolutely gave to him, and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof; but to give ſuch Releaſe or Diſcharge, as *B.* his Executors or Adminiſtrators ſhould require or think fit; *B.* died in the Life-time of the Teſtator; and it was held, that the Money directed to be paid the Wife and Children was well deviſed; but as to the Reſidue deviſed to the Debtor himſelf, that it was a lapſed Legacy, he dying in the Life-time of the Teſtator; although it was admitted, that if the Teſtator had ſaid, *I forgive ſuch a Debt*, or, that my Executor ſhall not demand it, or ſhall releaſe it, that would have been a good Diſcharge of the Debt, though the Debtor died in the Life-time of the Teſtator. *Mich.* 1705. between *Elliot* and *Davenport*, 2 *Vern.* 521. decreed.

2. *A.* deviſed an Eſtate to his Wife for her Life, and after to the Plaintiff, his Niece, and her Heirs, upon Condition, and to the Intent that ſhe pay 400 *l.* to ſuch Perſon as his Wife, by her Will in Writing, or any other Writing, ſhould direct and appoint, and dies; the Wife after marries a ſecond Husband, and then makes a Will in Writing, and thereby reciting the Power given her by her former Husband's Will, appoints the 400 *l.* to be paid to her Husband, his Executors or Adminiſtrators; and that when he ſhall have fully received the 400 *l.* he ſhall pay 100 *l.* out of it to *B.* 50 *l.* to *C.* and 50 *l.* to *D.* and makes her Husband her Executor, and then goes on, and ſays, that ſhe has publiſhed this her Laſt Will and Teſtament in the Preſence of three Witneſſes; and the Husband ſubſcribed that he does approve of this Will; afterwards the Husband died before her, and makes her Executrix of his Will and Reſiduary Legatee; then *B.* and *C.* die both Inteſtate, and afterwards the Wife dies; and the Defendants take out Adminiſtration to her, with the Will annexed, and alſo Adminiſtration to *B.* and *C.* and the Queſtion was, whether this Appointment being made by Will, and the Appointee dying before the Appointor, this ſhould be in the Nature of a Legacy, and ſo the Appointment void, the Teſtatrix ſurviving the Nominee; and my Lord *Keeper* held, that if it was a Thing purely Teſtamen-

tary, it would be plainly a lapſed Legacy; but that in this Caſe the 400 *l.* was not in its own Nature teſtamentary, but they take as Nominees; and 'tis but the Execution of a Truſt; and decreed the Money to be paid. *Mich.* 1700. between *Burnet* and *Helgrave.*

3. *E.* made her Will, and deviſed in theſe Wards, *I give unto my loving Kinſman* R. H. *the Sum of* 300 l. *one* 100 l. *Part whereof, he doth owe me, which I do intend to give to my Couſin* S. H. *his youngeſt Daughter; but my Will and Deſire is, that he will give the ſaid* 300 l. *to his Daughter* S. H. *at the Time of his Death, or ſooner, if there be Occaſion for her better Advancement and Preferment*; the Teſtatrix, at the Making of her Will, was in *England*, and it ſo fell out, that *R. H.* died in *Ireland*, eight Days before the Death of the Teſtatrix; afterwards *S. H.* died at the Age of Sixteen, and unmarried, and the Plaintiff was her Adminiſtrator; and it was decreed at the *Rolls*, and affirmed by my Lord *Chancellor*, that the Words, *I deſire*, or *I will*, amount unto an expreſs Deviſe, and that the *One hundred Pound* Bond to the Teſtatrix, ſhould be aſſigned to the Plaintiff, and the 200 *l.* paid him, with Intereſt from the exhibiting the Bill. *Mich.* 1704. between *Earles* and *England*, 2 *Vern.* 466, 467. Although it was inſiſted upon, that a Benefit was deſigned *R. H.* and that he was not a bare Truſtee, for he was to have the Intereſt of the 300 *l.* for his Life, unleſs his Daughter had Occaſion for it before his Death, which ſhe had not.

4. But where *A.* deviſed to his Siſter 350 *l.* upon Condition that ſhe, at or before her Death, ſhould give to her Children 200 *l.* thereof, and the Siſter died in the Life-time of the Teſtator; and it was held, that the whole 350 *l.* was lapſed; for it being a Deviſe of Money, the abſolute Property veſted in the firſt Legatee. *Mich.* 1689. between *Birkhead* and *Coward*, 2 *Vern.* 116. ruled on Demurrer.

5. If *A.* deviſes 1500 *l.* a-piece to the four Children of *J. S.* by Name, to the Sons to be paid at their Age of twenty-one Years, and to the Daughters at Eighteen, or Days of Marriage; and in Caſe one or more of the aforeſaid Children ſhall happen to die before his, her, or their reſpective Legacy or Legacies ſhall become due, then ſuch Legacy or Legacies ſhall go to the Survivors of them; and in Caſe three ſhould die, then the Survivor to take the Whole; if one of the Children dies in the Life-time of the Teſtator, the Survivors ſhall take that Share, and it ſhall not be a lapſed Legacy. *Hill.* 1690. between *Miller* and *Warren*, 2 *Vern.* 207. decreed; 2 *Vern.* 611. *S. P.* decreed between *Ledſome* and *Hickman.*

6. So where a Legacy of 50 *l.* was given to *A.* at Twenty-one, or Marriage, and 50 *l.* to *B.* at Twenty-one or Marriage; and in the Cloſe of the Will, the Teſtator added, if any Legatee dies before his Legacy is payable, the ſame ſhall go to the Brothers and Siſters of ſuch Legatee; *A.* dying in the Life-time of the Teſtator, it was adjudged no lapſed Legacy, but that it ſhould go to the Brothers and Siſters. *Trin.* 1700. between *Darrel* and *Moleſworth*, 2 *Vern.* 378. 2 *Vern.* 653. and 744. *S. P.* decreed. 1 *Vern.* 425. *S. P.* and 2 *Chan. Rep.* 187. *S. P.* and between *Northey* and *Burbage*, *Hill.* 1617. *S. P.* decreed.

7. So where a Man deviſed to *A.* and *B.* the two Daughters of his Brother *G.* to be paid within a Year after the Death of his Wife, *viz.* 50 *l.* to *A.* and 50 *l.* to *B.* if they ſhall both be alive at the Time of Payment; but if either of them ſhall die before, then the ſaid 100 *l.* to the Survivor of the ſaid two Daughters; one of the ſaid two Daughters died in the Life-time of the Teſtator; and the only Queſtion was, whether the ſurviving Daughter ſhould have the whole 100 *l.* or only the 50 *l.* and *Rawlinſon* and *Hutchins*, Lords Commiſſioners, were clearly of Opinion, that ſhe ſhould have the whole 100 *l.* they ſaid, that by the firſt Clauſe of the Will, it is a joint Deviſe to them of the 100 *l.* in which Caſe, if the Will had gone no further, if one had died, it would have ſurvived to the other, then the *Viz.* that comes after is only a Severance of it, in Caſe they ſhould both live to the Time of Payment, which they did not; and then the laſt Clauſe of the Will, in Caſe either died before the Time of Payment, is a new ſubſtantive Deviſe of the whole 100 *l.* to the Survivor; and decreed accordingly. *Mich.* 1691. between *Scolding* and *Green.*

## (C) Of ſpecifick and pecuniary Legacies, and here of Abating and Refunding.

1. IF *A.* by Will deviſes to his Wife all his Perſonal Eſtate at a Place called *W.* and deviſes to *B.* a Legacy of 500 *l.* and ſeveral other Legacies, and Aſſets prove deficient to pay the 500 *l.* and other Legacies; yet the Wife's Legacy being a ſpecifick Legacy ſhall take Place. *Mich.* 1714. between *Sayer* and *Sayer*, 2 *Vern.* 688. that a ſpecifick Legatee ſhall not abate in Proportion with a pecuniary One, *vid.* 2 *Vern.* 111. *Nel. Chan. Rep.* 303. 2 *Chan. Ca.* 25, 171. 1 *Vern.* 31. 2 *Salk.* 416.

2. *J. S.* having 4000 *l.* ſecured to him by Bond, in the Names of *A.* and *B.* in Truſt for himſelf, deviſed it to his Daughter (now married to the Plaintiff) and made her Reſiduary Legatee; and by the ſame Will deviſed a Leaſe he had in a Farm to *R. D.* and there not appearing Aſſets at his Death to pay his Debts, this Farm deviſed to *R. D.* was ſold for Payment of Debts; afterwards, by Decree of this Court, the 4000 *l.* was adjudged to be Aſſets to pay Debts, and was brought into Court, there to remain for that Purpoſe; the Plaintiff propoſed to have what remained of the 4000 *l.* paid out of Court to him, all Debts being, (as was ſaid) paid; and the Defendant *R. D.* oppoſed it, till he had firſt had Satisfaction out of it, for the Value of the Farm deviſed to him, and ſold for Payment of Debts. The Court held, that the Deviſe of this Sum of Money was a ſpecifick Legacy, and therefore *R. D.* can have but a proportionable Part of the Value of his ſpecifick Legacy out of it. *Mich.* 1700. between Lord *Caſtleton* and Lord *Fanſhaw.*

3. If a Man deviſes a ſpecifick Legacy, and likewiſe other Legacies, tho' the other Legacies fall ſhort, yet the Legatee muſt have his Specifick Legacy intire; but if a Man deviſes ſeveral Legacies, as 100 *l.* to one, and 50 *l.* to another, *&c.* there, altho' he directs the Legacy of 100 *l.* to be paid in the firſt place, yet if the other Legacies fall ſhort, then the Legatee of the 100 *l.* muſt make a proportionable

tionable Abatement of his Legacy; *Hill.* 1681. between *Brown* and *Alleyn*, 1 *Vern.* 31. 2 *Chan. Rep.* 138. *S. P.*

4. A Creditor ſhall make Legatees refund, when Aſſets become deficient, tho' there be no Proviſion made for refunding. 1 *Vern.* 94. 2 *Vent.* 360. *S. P.* 2 *Vern.* 205. *S. P.*

5. So where *A.* being indebted to *B.* made *C.* his Executor, and *C.* waſted the Eſtate and died, having deviſed ſeveral Legacies, and made *D.* Executor, which Legacies *D.* paid; and *B.* having exhibited a Bill againſt *D.* the Executor of *C.* for his Debt due from the firſt Teſtator, and againſt the Legatees in the Will of *C.* to compel them to refund their Legacies, there not being ſufficient Aſſets of the firſt Teſtator; and it was decreed accordingly. 1 *Vern.* 162. That a Creditor ſhall follow the Aſſets in Equity, into whoſe Hands ſoever they come. *Vid.* 2 *Vern.* 205.

6. One Legatee ſhall compel another to refund where the Aſſets become deficient, tho' there be no Proviſion made for refunding; 1 *Vern.* 94. but if the Executor is ſolvent, and he voluntarily paid the Legacy, the unſatisfied Legatee may come upon him, and oblige him to pay it out of his own Purſe. 1 *Chan. Rep.* 133. 2 *Chan. Ca.* 132. and therefore the Executor is always to be made a Party to the Suit. 1 *Chan. Ca.* 136, 248. 2 *Vent.* 360.

7. If an Executor pays out the Aſſets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies, he by a Bill in Equity may compel the Legatees to refund, 1 *Chan. Ca.* 136. if he had been compelled by a Decree in Equity to pay the Legacies, he may make the Legatees refund. 2 *Vern.* 205. *per Cur.*

8. But if an Executor voluntarily pays a Legacy, or aſſents to the Deviſe thereof, he cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund. 2 *Vern.* 205. 2 *Chan. Ca.* 9. 2 *Chan. Rep.* 248. 2 *Chan. Ca.* 145. 1 *Vern* 90, 453, 460. but for this, *vid.* Title *Executors and Adminiſtrators*, Letter (A.)

## (D) Of the Time of Payment of a Legacy.

1. IF a Legacy is given to a Child, payable at Twenty-one, and the Child dies before, tho' his Adminiſtrator ſhall have the Legacy, yet he muſt wait for it till ſuch Time as the Child, if he had lived, would have come to Twenty-one; 2 *Vern.* 199. but if it had been payable to the Infant with Intereſt, *Q.*

2. But if a Legacy is deviſed to *J. S.* to be paid at 23 Years of Age, and if he die before, to go over to *A.* and *B.* and *J. S.* dies an Infant, the Legacy ſhall be paid preſently. *Hill.* 1692. between *Paſſworth* and *Moor*, 2 *Vern.* 283. deviſed.

3. *A.* by Will gives a Legacy to *B.* at Twenty-one, and if he died before Twenty-one, then to the Plaintiff; *B.* dies before Twenty-one; and the only Queſtion was, whether the Plaintiff was entitled to the Legacy preſently, or muſt wait till *B.* if he had lived, would have been Twenty-one; and on Time taken to conſider of it, my Lord *Chancellor* was of Opinion, the Plaintiff was entitled to the Legacy preſently; but where a Legacy is given to one to be paid at Twenty-one, ſo as to be an Intereſt veſted in him preſently, tho' not payable till Twenty-one; if the Party dies before that Age, his

his Executors or Adminiſtrators ſhall not have it till the Legatee, if he had lived, would have been Twenty-one Years of Age. *Trin.* 1728. between *Laundy* and *William*, Decreed at my Lord *Chancellor's*.

4. A Legacy of 500 *l.* was given to the Defendant's Teſtator when he ſhould be 24 Years old; the Plaintiff being his Siſter, and Executrix to the Teſtator that gave the Legacy, paid the Legatee 250 *l.* of it at Twenty-one, to put him out into the World, and gave him a Bond, to pay him the other 250 *l.* at a Day certain, which was the very Day he would attain his Age of 24 Years: He died before that Age. To a Bill to have the 250 *l.* repaid, and the Bond delivered up, the Defendant pleaded the Payment, and the Bond which was for Payment at a certain Day, and became a Duty thereby; and upon Debate, the Plea was ordered to ſtand for an Anſwer, the Lord *Chancellor* declaring it was fit to be heard on the Merits. *Mich.* 1687. between *Luke* and *Alderne*, 2 *Vern.* 31.

## (E) To whom to be paid.

1. IF a Legacy of 125 *l.* is deviſed to an Infant, who is but ten Years old, and at that Age paid by the Executor to the Infant's Father for his Benefit; and the Father afterwards becomes inſolvent, yet the Executor ſhall not be obliged to pay it over again; but if the Executor took Security to be indemnified, then he paid it at his own Peril, and ſhall pay it over again. *Hill.* 26 & 27 *Car.* 2. between *Holloway* and *Collins*, 1 *Chan. Ca.* 245. but this Matter ſeems well ſettled by the following, as well as ſeveral other Reſolutions.

2. A Legacy of 100 *l.* was deviſed to an Infant of about ten Years of Age; the Executor paid this Legacy to the Father, and took his Receipt for it; when the Infant came of Age, the Father told him he had ſuch a Legacy of his in his Hands, but could not pay it immediately; but however would not have him trouble the Executor about it, for that he would give it him: Upon this the Son reſted ſatisfied for about 14 or 15 Years, and he and his Father carried on a Joint Trade together, and then became Bankrupts. And upon a Commiſſion taken out againſt the Son, this Legacy of 100 *l.* was aſſigned amongſt other Things for the Benefit of his Creditors, and the Plaintiff, the Aſſignee of the Commiſſion, brought this Bill againſt the Executor, to have an Account, and Payment of the Legacy; and for the Defendant it was inſiſted, that this would be an extream Hardſhip on him, if he ſhould be obliged to pay it over again; that he had already fairly and honeſtly paid it to the Father, whilſt he was in good Circumſtances. And if Application had been made ſooner, he might have had his Recompence over againſt the Father; that the Father was by Nature Guardian to his Children, and ſuch Payments to him have formerly been allowed good; though now indeed this Court has thought fit to extend their Care farther for ſuch Children, and diſallowed ſuch Payments; but the Circumſtances of this Caſe were ſuch, that the Defendant, it was hoped, would not be anſwerable again for it. My Lord Chancellor ſaid, that if the Father had not made his Son ſuch Promiſe of Recompence, and the Son had acquieſced all that Time, the Caſe might have been more doubtful; but this Promiſe of his Father drew him to forbear ap-

plying to the Executor ſooner; and ſince his Father had not, nor could now made good his Promiſe, being a Bankrupt likewiſe, the Reaſon of the Son's Forbearance was at an End; and he thought the Rule of this Court, in not ſuffering Parents to receive their Children's Legacies, was founded on very good Reaſon; and therefore, leſt this Caſe might hereafter be cited as a Precedent, when the Circumſtances attending it were forgotten; and to diſcountenance, and deter others from Paying ſuch Legacies to the Parents, (tho' he did not deny the Hardſhips of this particular Caſe) he decreed againſt the Executor; which was affirmed on a Rehearing. *Mich.* 1715. between *Doyley* and *Tollferry*.

3. If a Legacy be bequeathed to a Feme Covert, Payment of it to her alone is not good, and the Executor ſhall pay it over again to the Husband. 1 *Vern.* 261.

## (F) Where Legatees ſhall have Intereſt and Maintenance.

1. LEgatees exhibit a Bill againſt the Executor, and by their Guardian pray, that he may be obliged to allow them Maintenance; to which the Executor demurred, becauſe the Legatees were under Age, and their Legacies not payable till they were 21 Years of Age; but the Demurrer was over-ruled. *Mich.* 16 *Car.* 2. between *Renneſey* and *Parrot*, 1 *Chan. Ca.* 60.

Where a Legacy ſhall carry Intereſt, and from what Time, *vide* Title *Intereſt Money*, Letter (A).

2. If a Father deviſes Legacies or Portions to his Daughters or younger Children, to be paid or payable at their reſpective Ages of 21 Years, or any other Time certain, without making any Proviſion for their Maintenance in the mean Time, and die; in this Caſe they ſhall have Intereſt for their Portions from his Death, till paid, becauſe the Father was obliged to have provided for them if he had lived; but if ſuch Portions had been deviſed to them by a Stranger, to be paid or payable at ſuch an Age, their Legacies ſhould not carry Intereſt in the mean Time; becauſe he being a Stranger, was under no ſuch Obligation to provide for them. *Trin.* 1712. between the *Attorney General* and *Thompſon*.

3. A Father by his Will gave 2000 *l.* a-piece to his two Daughters, payable at twenty-one, and charged on Land and Perſonal Eſtate; and the Perſonal Eſtate being exhauſted in Debts, my Lord Chancellor held, they ſhould have a reaſonable Maintenance out of the Real Eſtate, until their Legacies became payable, and allowed them 80 *l. per Annum* each. *Trin.* 1729. between *Conway* and *Longville*.

## (G) Ademption of a Legacy.

1. A. Deviſed to his Daughter 200 *l. Item*, I give to her my Houſhold Goods, if ſhe ſhall not be married in my Lifetime, and afterwards in his Life he gives with his Daughter in Marriage above 200 *l.* and dies, not having revoked or altered his Will; and the Court held, that the Legacy was extinguiſhed by the Portion. *Mich.* 1689. between *Jenkins* and *Powell*, 2 *Vern.* 114. *Vide* 1 *Chan. Ca.* 301. 1 *Vern.* 95.

2. The Defendant's late Husband made his Will in Writing, and thereby amongſt other Things deviſes as followeth; *viz.* I give and deviſe to *A.* my good and only Uncle, the Sum of 500 *l.* that is to ſay, that Bond and Judgment he gave me for 400 *l.* and 100 *l.* in Money, and makes the Defendant his Executrix, and deſires her to be kind and aſſiſting to his Uncle, that he might live as became a Gentleman: The Uncle ſome Time after ſold an Eſtate, and with the Money paid off 320 *l.* and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining 80 *l.* and ſome Time after the Teſtator died; and the Uncle having Notice of this Will, brought his Bill for this Legacy of 500 *l.* The Defendant inſiſted, that this was a ſpecifick Legacy of that particular Bond and Judgment; and they being cancelled and altered before the Teſtator's Death, was an Ademption of the Legacy, as to ſo much; and beſides they urged, that this Payment of the 350 *l.* amounted to a Releaſe of ſo much of the Legacy, and therefore the Plaintiff would have no Right but to the remaining 100 *l.* On the other Side it was inſiſted, that the Diverſity is where the Money is voluntarily paid in by the Perſon who owes it, and where the Teſtator ſues for and recovers it: In the firſt Caſe the Legacy continues ſtill good, becauſe the Money comes only home to the Perſonal Eſtate; but in the other Caſe, the Teſtator by ſuing for it ſhews that he intended to make it his own, and therefore would not leave it to the Legatee to recover; and the Juſtice of the Uncle ought not to prevent the Affection of the Nephew; and no Alteration of his Intention appeared. My Lord Keeper was clear of the ſame Opinion, and decreed the 80 *l.* Bond to be delivered up, and the Reſidue of the Legacy to be paid. *Hill.* 1711. between *Orme* and *Smith*, 2 *Vern.* 681. *S. C.*

3. One by Will deviſed thus; *Item*, I give and bequeath to my Grandaughter *Mary Ford* (the Plaintiff) the Sum of 40 *l.* being Part of a Debt due and owing to me for Rent from *G. M.* ſhe allowing what Charges ſhall be expended in getting in the ſame. *Item*, I give and bequeath unto my Grandſons *A.* and *B.* the Reſt and Reſidue of what is due and owing to me from the ſaid *G. M.* which is about 40 *l.* more, to be equally divided between them, they allowing Charges as aforeſaid; after the Teſtator received the whole Debt owing for Rent from *G. M.* For the Plaintiff it was inſiſted, that there was a Difference between a ſpecifick and a pecuniary Legacy; that tho' the Diſpoſing of a ſpecifick Legacy might be an Ademption of it, yet this being a pecuniary Legacy, the Paying the Money to the Teſtator would be no Loſs of it. On the other Side was inſiſted upon the Difference between a voluntary and compulſory Payment; that tho' the firſt was no Ademption, yet the ſecond was, and that the Teſtator obliged *G. M.* to pay in the Money. But my Lord Chancellor was of Opinion, that there was no Foundation for the Difference taken in the Books, between a voluntary and compulſory Payment, for the later might be with an Intent to ſecure the Legacy on all Events; and decreed the Plaintiff the 40 *l.* Legacy. *Trin.* 1728. between *Ford* and *Fleming*. *Vide* 1 *Roll.* 614. *Moor* 789. *Raym.* 335. *Swinb. Part* 7. *Sect.* 20. *Went.* 64.

# CAP. XXXIX.

## Limitation of Suits and Demands.

(A) What Rights, Actions or Demands, are deemed out of the Statute of Limitations in Equity, and where such Rights, Actions or Demands, tho' once barred, may be revived, or set up again.

(B) Length of Time, how far regarded in Equity.

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### (A) What Rights, Actions or Demands, are deemed out of the Statute of Limitations in Equity, and where such Rights, Actions or Demands, tho' once barred, may be revived and set up again.

1. A Truſt is not within the (*a*) Statute of Limitations. *March* 129.

(*a*) By the 21 *Jac.* 1. *cap.* 16. all Actions upon the Caſe, other than for Slander, Actions of Account (other than what concerns Merchandize between Merchant and Merchant) Actions of Treſpaſs, *Quare Clauſum Fregit*, Debt upon Lending or Contract, without Specialty or Arrearages of Rent, for Detinue, Trover, Replevin, ſhall be commenced within ſix Years after the Cauſe of Action, and not after. But the Right of Infants, Feme Coverts, *non Compos Mentis*, Perſons impriſoned, or beyond Sea, is ſaved; ſo that they commence their Suits within the Time above limited, after their Imperfections removed: Provided that if in any ſuch Actions, Judgment is given for the Plaintiff, and the ſame is reverſed for Error; or if a Verdict paſs for him, and upon Motion in Arreſt of Judgment, it is given againſt him; or if the Defendant is outlawed in the Suit, and does after reverſe the Outlawry; in theſe Caſes the Plaintiff, his Heirs, &c. may commence a new Action within a Year, and not after; by 4 & 5 *Ann. cap.* 16. the Plaintiff's Right is as much ſaved, when the Defendant is beyond Sea, as if he were ſo himſelf; provided he brings his Action within ſuch Time after his Return, as is limited by the 21 *Jac.* 1.

2. The Plaintiff, who was Son and Executor of C. J. *Heath*, who was made C. J. at *Oxon* during the Difference between the King and Parliament, (but never ſat at *Weſtminſter-Hall*) exhibited a Bill againſt the Defendants, Prothonotaries of the K. B. at that Time, to have an Account of the Money, &c. received by them during that Time, by an implied Truſt *virtute Officii*; to which the Defendants

Defendants pleaded the Statute of Limitations; but upon Argument the Plea was over-ruled, 15 *Car.* 2. between Sir *Edward Heath* and *Henly & al'*, 1 *Chan. Ca.* 21. 3 *Chan. Rep.* 8. *S. C.*

3. So where the Plaintiff exhibited a Bill, to have an Account of Money received by the Defendant from his Father (whoſe Executor he was) who gave it to him to compound for his Eſtate, ſequeſtred for Delinquency at *Goldſmiths-Hall*; and it was ordered accordingly; the Court declaring it a Truſt, and therefore not within the Statute of Limitations. *Mich.* 15 *Car.* 2. between *Sheldon* and *Weldman*, 2 *Chan. Ca.* 26.

4. So where my Lady *Hollis* lent 100*l.* and in the Note which was given for it, Mention was made, that it ſhould be diſpoſed of as my Lady ſhall direct; and a Bill being exhibited for it, the Court held it a *Depoſitum*, or Truſt, and decreed Payment of it, tho' otherwiſe it was barred by the Statute of Limitations. 2 *Vent.* 345.

5. A Charity is not barred by Length of Time, or within the Statute of Limitations. 2 *Vern.* 399.

6. A Legacy is not within the Statute of Limitations. 1 *Vern.* 256.

(*b*) Accounts current or open, are not within the Statute of Limitations; but Accounts ſtated between Merchant and Merchant are barred by the Statute. 1 *Vent.* 89, 90. 2 *Saund.* 124.

7. The Statute of Limitations is no Plea in Bar to (*b*) an Account. *Paſch.* 1687. between *Scudmore* and *White*, 1 *Vern.* 456.

8. If a Man recovers a Judgment or Sentence in *France*, for Money due to him, the Debt muſt be conſidered here only as a Debt by Simple Contract, and the Statute of Limitations will run upon it. 2 *Vern.* 540, 541. *per Cur'*.

9. A Bill was exhibited to be relieved touching a Rent charged upon Lands by Will; the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in 40 Years; and the Court held, that the Caſe in * *Coke's Reports*, on the Statute *Hen.* 8. concerned only Cuſtomary Rents between Lord and Tenant, and not any Rent which commenced by Grant, or whereof the Commencement could be ſhewn. *Trin.* 1691. between *Collins* and *Goodal.* 2 *Vern.* 235.

* 4 *Co.* 10, 11.

10. If one receives the Profits of an Infant's Eſtate, and 6 Years after his coming of Age he brings a Bill for an Account, the Statute of Limitations is as much a Bar to ſuch a Suit, as if he had brought an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Eſtate is not ſuch a Truſt, as being a Creature of the Court of Equity, the Statute ſhall be no Bar to; for he might have had his Action of Account againſt him at Law; and therefore no Neceſſity to come into this Court for the Account. For the Reaſon why Bills for an Account are brought here, is from the Nature of the Demand; and that they may have a Diſcovery of Books, Papers, and the Party's Oath, for the more eaſy taking of the Account, which cannot be ſo well done at Law; but if the Infant lies by for ſix Years after he comes of Age, as he is barred of his Action of Account at Law, ſo ſhall he be of his Remedy in this Court; and there is no Sort of Difference in Reaſon between the two Caſes. *Trin.* 1719. between *Lockey* and *Lockey*, *per Curiam.*

11. If there is no (*c*) Executor againſt whom the Plaintiff may bring his Action, he ſhall not be prejudiced by the Statute of Limitations, nor ſhall any Laches in ſuch Caſe be imputed to him. 2 *Vern.* 695.

(*c*) If one brings an Action before the Expiration of ſix Years, and dies before Judgment, the ſix Years being then expired, this ſhall not prevent his Executor. 2 *Salk.* 424, 425. 2 *Salk.* 421. But if an Executor ſues upon a promiſory Note to the Teſtator, and dies before Judgment, and ſix Years from the original Cauſe of Action are actually expired, and the Executor of the Executor brings a new Action in four Years after the firſt Executor's Death, the Statute of Limitations ſhall be a Bar to ſuch Action. For tho' the Debt does not become irrecoverable by an Abatement of the Action after the ſix Years relapſed by the Plaintiff's Death, yet the Executor ſhould make a recent Proſecution, to which the Clauſe in the Statute, that provides a Year after the Reverſal of a Judgment, *&c.* may be a good Direction; or Shew, that he came as early as he could, becauſe there was a Conteſt about the Will or Right of Adminiſtration; for the Statute was made for the Benefit of Defendants, to free them from Actions when their Witneſſes were dead, or their Vouchers loſt. *Trin.* 5 *Geo.* 2. between *Willcox* and *Huggins*, adjudged in *B. R.*

12. If a Man ſues in Chancery, and pending the Suit there, the Statute of Limitations attaches on his Demand, and his Bill is afterwards diſmiſſed, the Matter being properly determinable at Common Law; in ſuch Caſe the Court will preſerve the Plaintiff's Right, and will not ſuffer the Statute to be pleaded in Bar to his Demand. 1 *Vern.* 73, 74. But if in ſuch Caſe the Plaintiff was not ſtayed by the Act of the Court, as Injunction, *&c. Q. & vid.* 2 *Chan. Ca.* 217. 1 *Chan. Rep.* 205, 214.

13. If a Man deviſes all the Reſt and Reſidue of his Perſonal Eſtate, after Debts and Legacies paid, to *J. S.* and ſeveral of the Creditors are barred by the Statute of Limitations, who notwithſtanding bring Actions againſt the Executor, and he refuſes to plead the Statute of Limitations, yet Equity will not, in Favour of *J. S.* to whom the Surplus is deviſed, compel the Executor to plead the Statute. *Mich.* 1699. between Lord *Caſtleton* and Lord *Fanſhaw* adjudged.

14. If a Man by Will or Deed ſubject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations ſhall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extinguiſhed that, tho' it hath taken away the Remedy. 1 *Salk.* 154. 2 *Vern.* 141. *S. P.*

15. If a Man has a Debt due to him by Note, or a Book-Debt, and has made no Demand of it for ſix Years, ſo that he is barred by the Statute of Limitations; yet if the Debtor, or his Executor, after the ſix Years, puts out an Advertiſement in the *Gazette*, or any other News-Paper, that all Perſons who have any Debts owing to them, may apply to ſuch a Place, and that they ſhall be paid; this (tho' general, and therefore might be intended of Legal ſubſiſting Debts only) yet amounts to ſuch an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again. *Paſch.* 1714. between *Andrews* and *Brown* decreed.

16. So if after the ſix Years the Debtor, upon Application for that particular Debt, acknowledges it, and promiſes Payment, this revives the Debt, and brings it out of the Statute; becauſe, as the Note it ſelf was at firſt but an Evidence of the Debt, ſo that being barred, this Acknowledgment and Promiſe is a new Evidence of the Debt; and being proved, will maintain an *Aſſumpſit* for Recovery of it. *Paſch.* 1714. between *Andrews* and *Brown*, *per Cur'*.

## (B) Length of Time how far regarded in Equity.

1. IF a Perſon has enjoyed an Eſtate twenty-five Years, though he cannot prove that Livery and Seiſin was made of it; yet he ſhall not be moleſted; for Equity, after ſuch Length of Time, will preſume Livery. *Toth.* 54. 1 *Vern.* 196.

2. So if a Perſon is in Poſſeſſion of a Copyhold Eſtate forty Years, under a Will, tho' he cannot prove that there was any Surrender to the Uſe of that Will, yet Equity will ſupply that Defect after ſuch Length of Time. 1 *Vern.* 195. 2 *Chan. Ca.* 150. *S. C.*

3. The Plaintiff exhibited a Bill to ſet aſide a Conveyance made by his Father twenty Years ago, and alledged, that at that Time his Father was *Non Compos*; but the Court diſmiſſed the Bill, and ſaid that after twenty Years it was not proper to examine, whether a Perſon was *Non Compos*, or not. 1 *Chan. Rep.* 40.

4. The Plaintiff exhibited a Bill againſt the Executors of a Purchaſer of certain Lands from him, to have 500*l.* Part of the Purchaſe-Money paid, which was decreed to be paid him thirty-three Years before; but the Executors having pleaded, that the Plaintiff and Defendant lived near each other, and that no Suit was commenced againſt their Teſtator in his Life-time, tho' the Plaintiff might have eaſily done it; the Court held the Plea good. 2 *Can. Rep.* 44.

5. So where a Bond of twenty-two Years old came to the Hands of an Executor; and in as much as the Obligee, till about ſeven or eight Years paſt, lived near the Teſtator, and never demanded any Intereſt, the Court conceived the Bond was ſatisfied, and ordered it to be cancelled. 1 *Can. Rep.* 78. *Vid.* 1 *Chan. Rep.* 88. *S. P.* 1 *Chan. Rep.* 106.

6. *A.* exhibited a Bill to have a Specifick Performance of a Covenant, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of *black Stones*, and that when the old one failed, he might ſink a new one, and that there ſhould be no other Pit for digging *black Stone*; but it appearing that the Defendant, and thoſe under whom he claimed, had been in Poſſeſſion of a Pit there above *ſixty* Years, the Bill was diſmiſſed. *Hill.* 1690. between *Scolefield* and *Whitehead*, 2 *Vern.* 127.

7. A Common which has been incloſed for thirty Years, ſhall not afterwards be thrown open. 1 *Vern.* 32.

8. The Defendant held a Copyhold of the Manor of *Ipeing*, at the Rent of eight Shillings *per Ann.* and it ſo appeared by the Court-Rolls of *Hen.* 8. of *Phil.* and *Mary*, and down to *Car.* 1. and in the 12 *Car.* 1. the Defendant's Mother was admitted, as of the Manor of *Ipeing*. The Owner of the Manor of *Dean*, which he purchaſed from *J. S.* who formerly was Owner of both Manors, brought his Bill to compel Payment of the 8*s. per Ann.* and although he admitted that the Copyhold was held of the Manor of *Ipeing*, and not of the Manor of *Dean*; yet the Rent having been paid to him for near twenty Years, which was the only Evidence he had to ſhew for it, the Arrears and growing Rent were decreed to him; and a Trial at Law denied, tho' prayed by the Defendant. *Mich.* 1705. between *Steward* and *Bridger*, 2 *Vern.* 516, 517.

9. *A.* devises his Estate to *B.* his Son, charged with 500 *l.* to his Grandaughter, the Daughter of *B.* payable at Twenty-one, or Marriage; *B.* on the Marriage of his Daughter, gives her 1500 *l.* Portion, but no Notice is taken of the 500 *l.* Legacy, nor any Release given for it; twenty Years afterwards, the Daughter and her second Husband bring a Bill against the Father for the 500 *l.* and the Bill was dismissed, for the 1500. shall be presumed a Satisfaction, especially after such a Length of Time. 2 *Vern.* 484. A Legacy presumed to be paid after a great Length of Time. 2 *Vern.* 21.

# CAP. XL.

# Master and Servant.

(A) What Remedy they have against each other.
(B) How far answerable for each other, to others.

## (A) What Remedy they have against each other;

1. A BILL was exhibited to be relieved against an Apprentice Bond and Articles, and to have them up; and upon Hearing, it was ordered, that the Defendant do, within a certain Time, *viz.* one Year, bring his Action, and go to Trial thereupon for his Damages; or in Default thereof, the Bond and Articles to be delivered up; and the Reason given was, that if it were in the Defendant's Choice to stay his Action as long as he pleased, he would stay till the Plaintiff's Witnesses were dead; and this Practice of putting the Master to sue, or to deliver up the Indentures, was said to be usual. *Hill.* 17 & 18 *Car.* 2. between *Baker* and *Shelbury*, 1 *Chan. Ca.* 70.

2. *A.* put his Son Apprentice to an Apothecary, and gave with him a Sum of Money, and allowed the Youth 10 *l. per Ann.* for his Clothes; the Defendant having put away his Apprentice, after he had lived some Time with him, by Reason of Negligence and Misdemeanors laid to his Charge; the Court decreed the Master to refund 30 *l.* of the Money, and the rather, because the Indentures were

(*a*) That the Indentures muſt be inrolled, *vid.* 2 *Vern.* 492.

were not (*a*) inrolled, ſo as the Matter was not properly cogniſable before the *Chamberlain* of *London*. *Trin.* 1688. between *Therman* and *Abell*, 2 *Vern.* 64.

3. *A.* placed his Son with an Attorney at the Time he lay ill of the Sickneſs whereof he afterwards died, and gave 120 *l.* with him, and Articles were executed, by which it was provided, that in Caſe the Maſter died within one Year, that then 60*l.* of the Money ſhould be returned; it happened that the Maſter died within three Weeks after Sealing of the Articles and Payment of the Money; and on a Bill brought againſt his Executor, the Court decreed 100 Guineas to be paid back to the Father, notwithſtanding the Agreement of the Parties. *Trin.* 1687. between *Newton* and *Rowſe*, 1 *Vern.* 460.

4. If an Apprentice marries without the Privity of his Maſter, yet that will not juſtify his Turning him away, but he muſt ſue his Covenant. 2 *Vern.* 492.

5. But by the Cuſtom of *London*, a Freeman may turn away his Apprentice for Gaming. 2 *Vern.* 291.

6. *A.* gave the Defendant *B.* a *Spaniſh* Merchant, 600*l.* to take his Son Apprentice, and entred into a Bond of 1000*l.* for his Fidelity, and at the ſame Time took a Covenant from his Maſter, that he ſhould at leaſt once a Month ſee his Apprentice make up his Caſh; the Defendant brought an Action on the Bond, alledging, that the Apprentice had run out 800*l.* And on a Bill to be relieved, my Lord *Keeper* held, the Meaning of the Covenant was, that the Defendant ſhould not only ſee to the Caſting up of the Caſh, that it was right in Figures, but to ſee the Caſh effectually made up; and therefore decreed the Plaintiff ſhould be anſwerable for no more than the Maſter could prove the Apprentice imbeziled in the firſt Month, when the Imbezilment began. *Mich.* 1705. between *Montague* and *Tidcombe*, 2 *Vern.* 518.

## (B) How far anſwerable for each other, to others.

1. *A.* As Maſter of a Ship, of which the Defendants were Part-Owners, bought ſeveral Goods of the Plaintiffs, as Beef, Bisket, Sails, *&c.* *A.* failed, and on a Bill to compel the Defendants to pay, they inſiſted that *A.* only was liable, becauſe he had Money from the Part-Owners to pay the Plaintiffs; but the Court held, that the Maſter was but a Servant to the Owners, and where a Servant buys, the Maſter is (*a*) liable; and though the Owners paid their Servant, yet if he paid not the Creditors, they muſt ſtand liable, and therefore decreed the Owners to pay the Plaintiffs their Debts in Proportion to their reſpective Shares and Intereſts in the Ship. *Hill.* 1709. between *Speering* and *Degrave*, 2 *Vern.* 643.

(*b*) Whatſoever comes within the Compaſs of a Servant's Buſineſs, the Maſter ſhall be chargeable therewith, as of his Command, and ſhall likewiſe have Advantage of the ſame, againſt others; but if a Servant borrows Money in his Maſter's Name, or takes it up of a Creditor of his Maſter's, without Order, that does not bind the Maſter. *Noy's Max.* 93, 94. *Dr. & Stud. Dial.* 2. *cap.* 42.

2. The Plaintiff *Graham* was *Privy Purſe to* King *James* the Second, and alſo Maſter of his *Buck-Hounds*; the Defendant *Stamper* was a *Laceman*, and by his Friends made Intereſt to the Plain-

tiff, that he might be made uſe of to furniſh Lace, *&c.* for the King's Hunt, and was employed accordingly, and *Graham* did likewiſe deal with him on his own private Account, and he was from Time to Time paid for what he furniſhed for the King's Liveries, *&c.* out of the Privy Purſe; but on King *James*'s going away, the Defendant brought an *Indebitat. Aſſump.* againſt *Graham*, as well for what he had furniſhed for the King's Uſe, as for what he had furniſhed for *Graham*'s own particular Uſe, and recovered for both; and on a Bill brought to be relieved, the Circumſtances of the Caſe appeared to be, that *Stamper* had been permitted to furniſh Lace and Fringes, *&c.* for the King, on his Deſire and Application made to *Graham*, on his Behalf; that the Entries in the Day-Book of ſuch Goods as were delivered for the King's Uſe, was without Price, that they may be added in the Leiger-Book, higher or lower, as they had a Proſpect of ſooner or later Payment; that the Defendant from Time to Time had been paid out of the King's Privy Purſe; and one Witneſs ſwore, that he ſaid he expected Payment from the Privy Purſe, and not elſewhere; that the Account of the Goods delivered to the King's Uſe had been paid off to about ten Months, but the Account of Goods delivered on *Graham*'s private Score, was of four Years Continuance, which ſhews that he kept them as diſtinct Accounts; that none of the Goods delivered for the King's Uſe came to *Graham*, nor was there any particular Promiſe to pay for any of them; and the Court held, that if the Law ſhould be, that he that ſpeaks for, or fetches Goods for his Maſter without any particular Promiſe of paying for them, is liable to pay for them (which they ſeemed to doubt); yet on theſe Circumſtances the Plaintiff was intitled to Relief, and accordingly ordered, that the Defendant ſhould only take out Execution for ſo much as the Plaintiff was indebted to him on his Account. *Trin.* 1692. between *Graham* and *Stamper*, 2 *Vern.* 146. *S. C.*

# CAP. XLI.

## Mortgages.

(A) Of the Nature and different Kinds of Mortgages, and herein of the Power of Equity in supplying Defects in Favour of the Mortgagee, and in Making that a Mortgage which otherwise would be an absolute Conveyance.

(B) Of the Equity of Redemption, at what Time.

(C) Of the Persons to redeem.

(D) Of Foreclosure; and here of Opening the Foreclosure; Parties foreclosed, and Tender and Refusal of the Mortgage-money.

(E) Where there are several Mortgagees of the same Estate; what Remedy they have against the Mortgagor, and against each other.

(F) Where a Mortgagee may protect himself by Buying in precedent Incumbrances.

(G) Where a Person who comes to redeem must do Equity to the Mortgagee before he will be admitted.

(H) Mortgage-money, to whom to be paid.

(I) Mortgagee answerable for the Profits, and how to account.

(K) How the Assignee of the Mortgagee is to account.

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### (A) Of the Nature and different Kinds of Mortgages; and herein of the Power of Equity in supplying Defects in Favour of the Mortgagee, and in Making that a Mortgage which otherwise would be an absolute Conveyance.

1. A *Mortgage* is the same Thing as the *Hypotheca* of the (*a*) Civilians, and may be defined a Pledging of Lands, or other immoveable

(*a*) The Civil Law distinguished between the *Pignus* and *Hypotheca*; the *Pignus* was when any Thing was obliged for Money lent, and the Possession passed to the Creditor; the *Hypotheca* was when the Thing was obliged for Money lent, and the Possession remained with

immoveable Thing, for Money lent in ſuch Manner, that the Profit or *Uſufructus* of the Thing pledged remains with the Debtor till ſuch Time as Default is made in Payment of the Money at the Time appointed

with the Debtor; and in Caſe of Goods pignorated, the Creditor was obliged to the ſame Diligence in Keeping them, as he uſed about his own; ſo that if the Goods were loſt by the Negligence of the Creditor, an Action lay; for the Property being transferred to the Creditor for a particular Purpoſe, he was to keep them at his Peril: If the Debtor did not redeem the Thing pledged, the Creditor was to foreclose the Redemption of the Debtor; or if the Money was not paid, the Creditor had his *Actio Pignoritia* or *Hypothecaria*; but if the Money was tendered or paid to the Creditor, the Contract of Pignoration was diſſolved, and the Debtor might have the Pledge back as a Thing lent; *Juſtin. Vin.* 592. and this ſeems to have introduced the Notion among us of the Debtor's Right of Redemption.

2. There were no Mortgages of Lands whilſt the ancient feudal Tenures continued, becauſe the Feud was filled with a Tenant from the Lord's original Bounty; but when a Liberty of Alienation was given, two Manner of Ways of Mortgaging were made Uſe of, which *Littleton* diſtinguiſhes between, and calls by the Names of *Vadium vivum* and *Vadium mortuum*. Co. Lit. 205.

3. The *Vadium vivum* is where a Man borrows 100*l.* of another, and makes an Eſtate of Lands to him, till he hath received the ſaid Sum of the Iſſues and Profits of the Lands; and it is called *Vadium vivum*, becauſe neither the Money nor the Land dieth; for the Lands are conſtantly paying of the Money, and they are not left as a dead Pledge, in Caſe the Money be not paid; and this ſeems to have been the moſt ancient Way of Pledging. *Lit. Sect.* 205.

4. The *Vadium mortuum* is ſo called, becauſe it is doubtful whether the Feoffor will pay the Money at the Day limited, or not; and if he do not pay, the Land which is but in Pledge, upon Condition for the Payment of the Money, is taken from him for ever, and ſo dead to him; and if he do pay it, then the Pledge is dead to the Tenant of the Land. The ancient Way of making thoſe Mortgages was by a Charter of Feoffment on Condition, that if the Feoffor, or his Heirs, paid the Sum to the Feoffee, or his Heirs, he ſhould re-enter and re-poſſeſs, and ſometimes the Condition was contained in the Charter of Feoffment, and ſometimes it was defeaſanced by another Charter made at the ſame Time. *Co. Litt.* 332. *Maddox* 318.

5. Theſe Sort of Conveyances were ſubject to theſe Inconveniences, that if the Money were not paid at the Day, the Eſtate became abſolute, and was ſubject to the Dower of the Wife of the Feoffee, and all other his Real Charges and Incumbrances, though he were afterwards permitted to perform the Condition. *Co. Litt.* 221. *Cro. Car.* 190.

6. But the Courts of Equity have ſet this Matter right, and have maintained the Right of Redemption, not only againſt Tenant in Dower, and the Perſons that come under the Feoffee, but even againſt Tenant by the *Curteſy* and the Lord by *Eſcheat*, that are in the *Poſt*; becauſe the Payment of the Money doth, in Conſideration of Equity, put the Feoffor *in ſtatu quo*, ſince the Lands were originally only a Pledge for the Money lent. *Hard.* 465, 469.

7. If Tenant in Tail demiſes Lands for ninety-nine Years by Way of Mortgage, under a Condition of Redemption, and on his Marriage ſuffers a Recovery and in Conſideration of, the Portion ſettles a Jointure, and then borrows more Money of the Mortgagee, and appoints the Term as a Security, the Recovery inures to make good the

the Term; and if the Mortgagee had no Notice of the Jointure, he ſhall be allowed the ſecond Money lent as well as the firſt. 1 *Chan. Ca.* 119, 120.

8. If a Copyholder in Fee ſurrenders to the Uſe of the Mortgagee in Fee, and the Copyholder becomes a Bankrupt before Preſentment, and there is no Preſentment; yet *per Cowper* Lord *Chancellor*, tho' the Surrender was void in Law for want of a Preſentment, and that might be the Laches of the Mortgagee, in not procuring of it, yet the Surrender was a *Lien*, and that bound the Land in Equity; and the Aſſignee under the Commiſſion of Bankruptcy ought not to be in a better Caſe than the Bankrupt, who was plainly bound in Equity by this defective Conveyance. *Mich.* 8. *Ann.* between *Taylor* and *Wheeler*, 2 *Salk.* 449.

9. The Plaintiff lent a Sum of Money on the Mortgage of ſome Houſes, and had a Bond for Payment of the Money, as uſual in ſuch Caſes; afterwards he lent a farther Sum of 2000 *l.* on the Equity of Redemption, and had a Bond for that likewiſe; afterwards the Mortgagor becomes a Bankrupt, and by ſome Accident the Value of the Houſes ſunk ſo much, that they were not ſufficient to raiſe the Mortgage-money firſt lent; and on a Bill brought to have them ſold, and that as to ſo much as they fell ſhort to anſwer the firſt Mortgage-money, the Mortgagee might come in upon his Bond as a Creditor; it was ſo decreed; and as to the 2000 *l.* lent upon the Equity, which was worth nothing, it muſt ſtand ſingly upon the Bond. *Paſch.* 1695. between *Wiſeman* and *Carbonell.*

10. *A.* lends Money to *B.* to carry on certain Buildings, and takes a Mortgage from him to ſecure 16000 *l.* with Intereſt, and by another Deed executed at the ſame Time, takes a Covenant from *B.* that he ſhould convey to him, if he thought fit, Ground-Rents to the Value of 16000 *l.* at the Rate of twenty Years Purchaſe; and on a Bill brought to redeem, the Maſter of the *Rolls* decreed a Redemption, on Payment of Principal, Intereſt and Coſts, without Regard to that Agreement, but ſet aſide the ſame as unconſcionable; for a Man ſhall not have Intereſt for his Money, and a collateral Advantage beſides for the Loan of it, or clog the Redemption with any By-Agreement. *Mich.* 1705. between *Jennings* and *Ward*, 2 *Vern.* 520.

11. If the Condition of a Mortgage is, that the Mortgagor ſhould redeem during his Life, or that the Mortgagor, and the Heirs of his Body, ſhould redeem; yet Equity will admit the General Heir of ſuch Mortgagor to a Redemption, becauſe this can be no Purchaſe, ſince there is a Clauſe of Redemption; and when the Land was originally only a Pledge for Money, if the Principal and Intereſt be offered, the Land is free; and it would be very hard, that it ſhould be in the Power of the Scrivener, or griping Uſurer, by ſuch impertinent Reſtrictions, to elude the Juſtice of the Court. 1 *Vern.* 33, 190. *S. C.* 2 *Chan. Ca.* 147. *S. C.*

12. But if a Man borrows Money of his Brother, and agrees to make him a Mortgage, and that if he has no Iſſue Male, his Brother ſhould have the Land; ſuch an Agreement made out by Proof, may well be decreed in Equity. 1 *Vern.* 193. *per North* Lord *Keeper.*

13. *A.* in Conſideration of 1000 *l.* made an abſolute Conveyance to *B.* of the Reverſion of certain Lands after two Lives, which at that Time were worth little more; and by another Deed of the ſame Date, the Lands are made redeemable any Time during the Life of

the Grantor only, on Payment of the 1000 *l.* and Intereſt; *A.* died, not having payed the Money; and it was held by my Lord *Nottingham*, that this Heir might redeem, notwithſtanding this reſtrictive Clauſe; and that it was a Rule, *once a Mortgage and always a Mortgage*, and that *B.* might have compelled *A.* to redeem in his Life-time, or have forecloſed him; but on a Re-hearing, Lord *Keeper North* reverſed the Decree on the Circumſtances of this Caſe; for it appeared, by Proof, that *A.* had a Kindneſs for *B.* and that he had married his Kinſwoman, which made it in the Nature of a Marriage-Settlement; he likewiſe held, that *B.* could not have compelled *A.* to redeem during his Life; which made it the more ſtrong. 33 *Car.* 2. between *Newcomb* and *Bonham*, 1 *Vern.* 7, 214. *S. C.* 232. *S. C.* 2 *Vent.* 364. *S. C.* where it is ſaid, that Lord *North*'s Decree was affirmed in the Houſe of Lords. *Vide* 1 *Vern.* 268.

14. If *A.* mortgages Land to *B.* worth 15 *l. per Ann.* for ſecuring 200 *l.* and at the ſame Time *B.* enters into a Bond, conditioned, that if the 200 *l.* and Intereſt is not paid within a Year, then he to pay to *A.* his Executors or Adminiſtrators, the further Sum of 78 *l.* in full for the Purchaſe of the Premiſſes, *&c.* and *A.* dies within the Year, and the Money is paid the next Day after the Mortgage is forfeited to his Adminiſtrator; yet *A.*'s Heir may redeem, paying the 200 *l.* and likewiſe the 78 *l.* that was paid the Adminiſtrator. *Mich.* 1687. between *Willet* and *Winnell*, 1 *Vern.* 488. decreed.

15. So where *A.* for 550 *l.* made an abſolute Aſſignment of a Church-Leaſe for three Lives to *B.* and *B.* by Writing under his Hand agreed, that if *A.* paid 600 *l.* at the End of the Year, *B.* would reconvey; *B.* died, leaving *C.* his Son and Heir; Two of the Lives died, and the Leaſe was twice renewed by *C.* and his Father; and tho' it was near twenty Years ſince the Conveyance was made, yet the Maſter of the *Rolls* decreed a Redemption on Payment of the 550 *l.* and the two Fines, *&c.* *Mich.* 1688. between *Manlove* and *Ball*, 2 *Vern.* 84. *vide* 1 *Vern.* 183, 394. where a Mortgagee was allowed to redeem before the Time agreed on.

## (B) Of the Equity of Redemption, at what Time.

1. AT a Re-hearing before my Lord *Keeper*, aſſiſted with Juſtice *Vaughan* and *Turner*, concerning the Redemption of a Mortgage which had been made above forty Years, my Lord *Keeper* declared that he would not relieve Mortgages after twenty Years, for that the Statutes of Limitations did adjudge it reaſonable to limit the Time of one's Entry to that Number of Years, unleſs there are ſuch particular Circumſtances as may vary the ordinary Caſe, as Infants, Femes Covert, *&c.* who are provided for by the very Statute, though thoſe Matters in Equity are to be (*a*) governed by the Courſe of the Court; and that it is beſt to ſquare the Rules of Equity

(*a*) Though there is no Time limited for Redemption of Mortgages; yet where a Man comes in at an old Hand, it hath been ſometimes decreed, that the Poſſeſſor ſhould Account no farther than for the Profits made in his own Time, to diſcourage the Stirring in ſuch dormant Titles; but the common Doctrine in the Courts of Equity, is, that Mortgages are not within the Statute of Limitations, though that Statute is mentioned ſometimes as a proper Direction to go by; for the Courts of Equity are tender of Settling any

ſet Time, becauſe a Man can never be injured, if he receives Principal, Intereſt, and Coſts; but the Proprietor of the Land is injured if he parts with his Poſſeſſion under the true Value; but ſometimes the Court hath allowed Length of Time to be pleaded in Bar, where the mortgaged Eſtate hath deſcended as a Fee, without Entry or Claim from the Mortgagor, and where the Poſſeſſor would be intangled in a long Account. *Vide* 1 *Chan. Ca.* 102. 1 *Chan. Rep.* 97, 98, 184, 206.

quity as near the Rules of Reaſon and Law as may be. Between *Ewre* and *White*, 2 *Vent.* 340.

2. A Bill was exhibited to redeem a Mortgage; to which the Defendant demurred, becauſe by the Plaintiff's own ſhewing, it appeared the Mortgage was ſixty Years old; but upon Argument the Demurrer was over-ruled, becauſe it was charged in the Bill, that the Mortgagor agreed the Mortgagee ſhould enter, and hold till he was ſatisfied; which is in the Nature of a *Welſh* Mortgage; and in ſuch Caſe the Length of Time is no Objection. *Mich.* 1686. between *Orde* and *Herning*, 1 *Vern.* 418.

3. So where a Bill was exhibited to redeem a Mortgage made in 1642. though the Mortgagee entred in 1650. and there were three Deſcents on the Defendant's Part, and four on the Part of the Plaintiff; yet the Length of Time being anſwered for the greateſt Part by Infancy or Coverture; and for as much as in 1686. a Bill was brought by the Mortgagee to foreclоſe, and an Account then made up by the Mortgagee, the Court decreed a Redemption, and an Account from the Foot of the Account in 1686. *Trin.* 1700. between *Proctor* and *Cowper*, 2 *Vern.* 377.

4. But where a Mortgage was made to *A.* in the Year 1639 to indemnify him againſt Debts, for which he was engaged for the Mortgagor, and in the Year 1649. he entered into the mortgaged Premiſſes, and had Poſſeſſion, and afterwards conveyed away ſeveral Parts of the mortgaged Premiſſes to ſeveral Perſons, and ſeveral Sales and Marriage-Settlements had been made of them. In the Year 1663. a Bill was brought to redeem, but all the Aſſignees were not Parties; and a Decree to an Account, and a Report made, and Exceptions taken to that Report; and ſo it reſted for about eighteen Years, and then another Bill was brought, and another Decree to redeem, but no Proſecution upon it from the Year 1676 till 1697. and then the Plaintiff having purchaſed the Equity of Redemption of thoſe Lands (*inter alia*) from the Heirs of the Mortgagor, brought his Bill to redeem; the Objections againſt it were, the Length of Time, the many derivative Titles that had been made, and when no Suit was depending, and the Difficulty of Taking the Account; to which it was anſwered, that there had been freſh Purſuits, and that the Difficulty of the Account had been occaſioned by the Mortgagees themſelves, and that there were Infants in the Caſe. My Lord *Keeper* held, there ought to be no Redemption, and that Length of Time excuſes the Mortgagee for taking the Eſtate for his Own, and uſing it accordingly; and none that have come in under him have done amiſs; and though there were Infants in the Caſe, yet the Time having begun upon the Anceſtor, it ſhall run even upon Infants, as it is at Law in the Caſe of a Fine; and there is one great Objection to a Redemption in this Caſe, that it does not appear, that the Plaintiff paid any Thing for this Equity of Redemption, only had it thrown into his Bargain. *Hill.* 1700. between *St. John* and *Turner*, 2 *Vern.* 418. *S. C.*

5. The Plaintiff's Grandfather in the Year 1686. had made a Mortgage of the Eſtate in Queſtion, which proved to be about nine or ten Pounds *per Annum*, for ſecuring 100 *l.* in the Year 1696. this Mortgage was aſſigned over to the Defendant, who by Agreement was then let into Poſſeſſion, and had continued ſo ever ſince, and was now about ninety Years of Age; the Mortgagor died ſeveral Years ſince, leaving the Plaintiff's Father, his eldeſt Son and Heir of full Age, who likewiſe died in the Year 1714. leaving the Plaintiff his eldeſt Son and Heir, then about twelve Years of Age, who brought this Bill for an Account, and to be let into a Redemption of the Eſtate in Queſtion, but which the Defendant had been in Poſſeſſion of thirty-three Years, and ſo was greatly over-paid his Principal and Intereſt; but my Lord *Chancellor* diſmiſſed his Bill, and ordered it to be entered down, as one of the Reaſons for diſmiſſing the Bill, that the Plaintiff had no Remedy by Ejectment at Law to recover the Poſſeſſion, being barred by the Statute of Limitations, and he thought that a reaſonable Guide for this Court to follow, as to the Redemption in Equity; and tho' the Plaintiff was an Infant at his Father's Death, yet the Computation of Time began long before, when there was no Infancy in the Caſe, and therefore will run on againſt Infants after. *Mich.* 1729. between *Knowles* and *Spence.*

## (C) Of the Perſons to redeem.

1. A Perſon who comes in by a voluntary Conveyance may redeem a Mortgage. 1 *Vern.* 193. admitted, he who comes to redeem a Mortgage, muſt ſhew a Title. 1 *Vern.* 182.

2. If a Man enters into a Bond, in which he binds himſelf and his Heirs, and dies, leaving a Real Eſtate to deſcend to his Heir, ſubject to a Mortgage for Years, and the Heir ſells the Equity of Redemption; the Obligee cannot redeem the Mortgage, without firſt having a Judgment at Law againſt the Heir. *Paſch.* 1702. between *Bateman* and *Bateman.*

3. The Mortgagee in Fee after Forfeiture was attainted, and the King ſeized, and whether the Mortgagor ſhould redeem *Dubitatur. Hard.* 465.

4. *A.* mortgaged his Lands upon Condition, that if he or his Heirs repaid 100 *l.* at ſuch a Day, he ſhould re-enter, before the Day he dies, leaving Iſſue a Daughter, his Wife *Enſient* with a Son; the Daughter pays the Money at the Day, and then the Son is born; the Daughter ſhall keep the Lands, and the Son ſhall not recover againſt her, for the Daughter is in Nature of a Purchaſer, where ſhe hath regained the Land by her own Vigilance, which otherwiſe had lapſed at Law to the Mortgagee. *Cro. Car.* 87. 1 *Co.* 99.

5. If a Man deviſes Lands which are in Mortgage to *A.* for Life, Remainder to *B.* in Fee; *A.* ſhall contribute one Third towards the Diſcharge of the Mortgage. 1 *Chan. Ca.* 271. *vide* 2 *Vern.* 117. and Title *Contribution* and *Average*, Letter (B).

6. If a Jointreſs, who is to hold the Land free from Incumbrances, pays off a precedent Mortgage, her Executors ſhall hold over till they are ſatisfied, becauſe ſuch Tenant for Life ought to be reimburſed the Money ſhe paid to ſet her Eſtate free, and in the Condition

dition ſhe ought to have been. 1 *Chan. Ca.* 271. 2 *Chan. Ca.* 100. 1 *Chan. Rep.* 19.

7. But if a Jointreſs after Marriage join with her Husband in a Fine, and mortgage the Land, and the Husband dies, there her Land is charged, and ſhe ſhall pay her Part towards the Disburthening the Land; and her Executors ſhall not hold the Lands till ſatisfied thereof, becauſe ſhe herſelf concurred in the Laying on the Charge, and therefore muſt join in the Disburthening of it, according to the Value of her Intereſt. 1 *Chan. Ca.* 271. 2 *Chan. Ca.* 99, 100. 1 *Chan. Rep.* 19.

8. If a Man marries a Jointreſs of Houſes which are burnt down, and the Husband and Wife borrows 1500 *l.* to build on the Ground, and levy a Fine *ſur conceſſit* for ninety-nine Years, if the Wife lived ſo long, and a Deed is made between the Conuzee and the Husband, wherein the Husband covenants to repay the Mortgage-Money with Intereſt, and the Equity of Redemption is limited to the Husband and his Heirs; and the Husband expends 3 or 4000 *l.* in building upon this Ground, and dies; the Wife ſhall redeem, and not the Heir of the Husband. Decreed by *Nottingham* Lord *Chancellor*, and affirmed on a Re-hearing by *North* Lord *Keeper*, between *Brend* and *Brend*, 1 *Vern.* 213. for the Wife was no Party to the Deed of Redemiſe, by which the Redemption was limited to the Husband; and the Wife being a Jointreſs, and having granted a Term for Years only out of her Eſtate for Life, there reſts a Reverſion in her, which naturally attracts the Redemption.

9. *A.* on his Marriage agreed to leave his Wife 1000 *l.* if ſhe ſurvived him; the Drawing of the Agreement was left to the Parſon of the Pariſh, who made a Bond from *A.* to his intended Wife in 2000 *l.* conditioned to leave her 1000 *l.* if ſhe ſurvived him; the Marriage was had, and *A.* died, leaving a Freehold and a Copyhold Eſtate in Mortgage, and which were mortgaged together; and it was held, that the Wife ſhould redeem as well the Freehold, as Copyhold, and hold over till ſhe was ſatisfied. *Hill.* 1704. between *Acton* and *Pierce*, 2 *Vern.* 480.

10. *A.* joins with *B.* her Husband, in making a Mortgage for Years of her Inheritance for 4500 *l.* to ſupply the Husband's Occaſions, to pay for the Place of Captain of the *Band* of *Penſioners*, and ſubject to the Mortgage; the Eſtate was ſettled in *A.* for Life, Remainder to her Son in Tail. *B.* in the Mortgage-Deed covenants to pay the Money, and the Proviſo was, that on Payment of the Mortgage-Money, the Term was to ceaſe; the Mortgage was ſeveral Times aſſigned, and particularly in 1683. and the Wife joined in it; and there the Proviſo was, that on Payment of the Money by them, or either of them, the Mortgage-Term was to be aſſigned, as they, or either of them ſhould direct or appoint. A few Days after the Mortgage was made, *B.* by Letter thanked his Wife for having ſealed it, and added, that the Profits of the Office ſhould be religiouſly applied to pay off the Incumbrance; but afterwards when Money came in, tho' he paid off the Mortgage, yet he took an Aſſignment thereof in Truſt for himſelf, and by Will deviſed his Perſonal Eſtate, and the Benefit of this Mortgage, to his ſecond Wife; and on a Bill by the Son of the firſt Wife, to have this Mortgage aſſigned him, it was declared by my Lord *Keeper*, that he could not decree for him, but upon

upon the uſual Terms of Redemption, on Payment of Principal, Intereſt and Coſts, diſcounting Profits; but upon an Appeal to the Lords, the Son obtained a Decree to have the Mortgage aſſigned to him. *Paſch.* 1702. between the Earl and Counteſs of *Huntington*, 2 *Vern.* 437.

11. So where *A.* and his Wife mortgaged the Wife's Eſtate, and *A.* covenanted to pay the Money, but the Equity of Redemption was reſerved to them and their Heirs; the Husband dying, it was decreed, that the Mortgage ſhould be diſcharged out of the Huſband's Eſtate. *Hill.* 107. between *Pocock* and *Lee*, 2 *Vern.* 604.

## (D) Of Foreclosure; and here of opening the Foreclosure, Parties foreclosed, and Tender and Refusal of the Mortgage Money.

1. A Mortgagee obtained a Decree againſt a Mortgagor and all the Creditors whoſe Debts affected the Eſtate, that they ſhould redeem, or be foreclоſed. One of the Creditors pays the Money by the Conſent of the reſt, and has the Mortgage aſſigned to him; and agrees with them, that if they would pay his Money at a further Day, they ſhould redeem him; otherwiſe, that he ſhould have the Lands abſolutely; and it was held, on a Bill brought by the other Creditors, that they ſhould redeem, tho' the Creditor who paid the Money had been in Poſſeſſion 20 Years, and had made great Improvements, they allowing only neceſſary Repairs, and laſting Improvements. *Hill.* 1682. between *Exton* and *Greaves*, 1 *Vern.* 138.

2. There being a firſt and ſecond Mortgage made of the ſame Eſtate, the firſt Mortgagee brought a Bill againſt the ſecond, to compel him to redeem, or to be foreclоſed, and foreclоſed him accordingly; it ſo happened, that the firſt Mortgagee, by his Will, deviſed the Premiſſes to the Mortgagor; and thereupon the ſecond Mortgagee brought a new Bill to ſet aſide the firſt Mortgage, and to be let in to a Satisfaction of his Money; the Defendant pleaded the former Suit and Decree of Foreclоſure; but the Plea was over-ruled. *Trin.* 1691. between *Cook* and *Sadler*, 2 *Vern.* 235.

3. If a Mortgagee has a Decree of Foreclоſure, tho' that Decree be ſigned and inrolled, yet if he after brings an Action of Debt on the Bond given at the ſame Time for Payment of the Money and Performance of the Covenants in the Mortgage Deed, ſuch Action opens again the Foreclоſure, and lets in the Equity of Redemption of the Mortgagor. *Trin.* 1729. between *Daſhwood* and *Blythway*, at the *Rolls*.

4. A Man makes a Mortgage, and afterwards makes a Marriage Settlement of the Equity of Redemption, wherein he limits it on the Wife, and then on the Iſſue of his Body, with Remainder in Tail to his Brother; the Mortgagee exhibits his Bill againſt the Mortgagor to have his Money, or that he may ſtand foreclоſed, without making the Brother a Party, and has a Decree accordingly; and afterwards the Mortgagor dies without Iſſue, and the Lands remain to the Brother by the Marriage Settlement, who prefers his Bill to redeem; and it was diſmiſſed; for having made thoſe Parties to

the Bill of Foreclosure, who were Parties to the Mortgage, he did as much as was neceſſary; for perhaps it was impoſſible for him to know all the Parties againſt whom to ſeek a Foreclosure; and this would keep him an eternal Bailiff to the Mortgagor; beſides, to open an Account after Length of Time againſt a Perſon, who by Law was obliged to keep no Account, in Favour of a meer Volunteer is unreaſonable. 1 *Chan. Ca.* 217, 220.

5. Tenant for Life, the Reverſion in Fee; he in Reverſion mortgages his Eſtate in Fee, and the Mortgagee deviſeth it; the Deviſee may bring his Bill againſt the Mortgagor, and need not make the Heir of the Deviſor a Party; becauſe he hath no Intereſt in the Lands at all, it being all deviſed away from him, and he need only foreclose the Mortgagor. 2 *Chan. Ca.* 32.

6. If a Man morgages Lands, and then confeſſes ſeveral Judgments, and ſome of the Perſons that have Judgments give the Mortgagee Notice, and after he obtains againſt the Mortgagor a Decree to foreclose; ſuch Perſons, that gave Notice of their Intereſt, ſhall notwithſtanding redeem, becauſe they are Creditors for a valuable Conſideration, and the Mortgagee had Notice of them, ſo that he might have made them Parties to his Bill; but the Perſons, that gave no previous Notice of their Judgment, are totally barred of all Redemption by the former Decree. 1 *Chan. Rep.* 170, 171.

7. But when a Bill was exhibited by a ſecond Mortgagee to redeem, and the firſt Mortgagee pleaded his Mortgage, and a Decree to foreclose the Mortgagor, without Notice of the ſecond Mortgage, yet the Plea was over-ruled. *Mich.* 1707. between *Godfrey* and *Chadwell*, 2 *Vern.* 601.

8. If the Mortgagor (*a*) tenders the Money, and the Mortgagee refuſes, he loſes the Intereſt from the Time of the Tender, becauſe it is but a Pledge for the Money; and if the Money be tendered, he ought not to keep the Pledge; and no Man ought to pay for the Forbearance, when he hath the Money ready. *Chan. Ca.* 29. 2 *Chan. Ca.* 206. *S. P.*

(*a*) If upon a Mortgage, a Tender be made of the Money at the Place appointed for Payment, at any Time of Day ſpecified in the Condition, and the Mortgagee refuſes, the Condition is ſaved for ever, and the Mortgagor need not ſtay at the Place appointed till the laſt Inſtant of the Day, becauſe by the expreſs Letter of the Condition, the Money is to be paid on the Day indefinitely; nor needs there be any new Tender afterwards within a convenient Time, becauſe by the Words of the Contract, both Parties ought to acquieſce; and upon ſuch Refuſal, the Land is diſcharged, becauſe upon the Tender the Demiſe is void; and if it be on a Feoffment the Condition is performed, and the Feoffor may reenter; but the Money lent doth yet remain a Debt or Duty, becauſe it was a Debt by the original Lending of the Money, whether it had been ſo ſecured or not; and tho' the Security fails according to the Words of the Agreement, yet there is the ſame natural Juſtice that the Money ſhould continue. *Co. Lit.* 209. 5 *Co.* 114. *Plow.* 173.

9. The Plaintiff had made a Mortgage in Fee of his Eſtate, which by ſeveral Meſne Aſſignments was come to Sir *William Dodwell*; and there being likewiſe two ſeveral Terms for Years ſtanding out, they were aſſigned to Truſtees, in Truſt for Sir *William Dodwell*, to Protect the Inheritance, and ſubject to the ſame Equity of Redemption; the Plaintiff and Sir *William Dodwell* ſettled an Account of what was due; and there appearing to be due thereon 4400 *l.* Principal Money, the Intereſt was then paid off, and at the ſame time Sir *William Dodwell* gave a Note, whereby he promiſed, that on Payment of the Sum of 4479 *l.* or thereabouts, on the 23d of *October* then next, being the Intereſt computed to that Time, he would reconvey the Inheritance to the Plaintiff and his Heirs, and would pro-

cure his Truſtees to aſſign the two Terms for Years, as the Plaintiff ſhould direct. In *Auguſt* following Sir *William Dodwell* died, and the Defendants were his Executors; and he likewiſe left the Defendant *Mary*, his only Child, and Heir at Law, an Infant of about eight Years of Age; the Plaintiff provided the Money, and on the 23d of *October* tendered a Bank-Bill of 4500 *l.* to one of the Executors, (there being four in all) for him to take thereout what was then due for Principal and Intereſt; but the Executors having none of them proved the Will, he refuſed to accept of the Tender; upon which the Plaintiff asked him, if he objected to the Legality of the Tender, being in a Bank-Bill and not in Money, and that if he did, he would preſently turn it into Money; to which the other anſwered, he had no Objection to the Tender, but not having proved the Will, he would not accept of the Money. Afterwards the Plaintiff made the like Tender to another of the Executors, who likewiſe refuſed to accept of it, not having proved the Will; but he objected to the Legality of the Tender, not being in Money: Afterwards all the four Executors proved the Will; and the Bill was brought to redeem on Payment of 4400 *l.* and Intereſt to the 23d of *October*, being the Time mentioned in the Note; and that the Plaintiff might not be obliged to pay Intereſt beyond that Time, as the Defendant's Executors inſiſted he ought: And 'twas held by my Lord Chancellor, that this Tender in a Bank-Note was not, ſtrictly ſpeaking, a Legal Tender; but ſince it was proved the Plaintiff offered to turn it into Money, that made it a good Tender. 2*dly*, It was clearly agreed, that any, or either of the Executors, before Probate, might have received and given a good Diſcharge for the Money, eſpecially when, as appeared in this Caſe, they afterwards proved the Will, and ſo were Executors *ab initio*. 3*dly*, that tho' they were Executors only in Truſt for the Daughter who was an Infant, yet none of them could be in a better Caſe than Sir *William Dodwell* himſelf could have been, if he had been living; and ſuch Tender under theſe Circumſtances would have bound him; ſo it will his Executors and Deviſee; and therefore decreed a Redemption on Payment of the 4400 *l.* and Intereſt to the 23d of *October*, the Time mentioned on the Note, and no longer, and no Coſts on either Side; and the Infant Heir at Law, on Payment of the Money to the Executors, was to convey the Inheritance deſcended to her according to the Act 7 *Ann.* for obliging Infant Truſtees to aſſign and convey. *Hill.* 1729. between Sir *John Auſten* and the Executors of Sir *William Dodwell*, at my Lord *Chancellor's*.

(E) Where

## (E) Where there are ſeveral Mortgagees of the ſame Eſtate, what Remedy they have againſt the Mortgagor, and againſt each other.

1. IF a Man mortgages Lands by a defective Conveyance, and afterwards mortgages to a ſecond Perſon, by an Aſſurance, that is good and effectual, with Notice, the Second ſhall prevail, becauſe that carries the Legal Title; and Equity will not interpoſe, when both are equally upon a valuable Conſideration; but if a Man mortgages by a defective Conveyance, and there are ſubſequent Creditors, whoſe Debts did not originally affect the Land, Equity will ſupply ſuch defective Conveyance againſt ſuch ſubſequent Incumbrances, who acquired a Legal Title afterwards; for ſince the ſubſequent Creditors did not originally take the Lands for their Security, nor had in View an Intention to affect them, when afterwards the Lands are affected, and they come in under the very Perſon that is obliged in Conſcience to make the Defective Security good, they ſtand in his Place, and ſhall be poſtponed to ſuch Defective Conveyance. *Mich.* 1670. between *Burgh* and *Francis*, by Sir *Heneage Finch*, Lord Keeper.

2. The Mortgagor being Son-in-Law to the Mortgagee, having entered, and afterwards ſuffered the Mortgagor to take the Profits for ſeveral Years, without requiring Intereſt; it was held by the Court, that the Intereſt of the firſt Mortgagee ſhould not affect the Lands, ſo as to keep out the ſecond Mortgagee longer than he would have been, had the Intereſt been duly paid; it was likewiſe held, that if a Mortgagee, after Notice of a ſubſequent Mortgage, joins with the Mortgagor, in a Sale of the Lands to a Stranger, the Money received by either, for the Purchaſe, ſhall ſink ſo much of the Mortgage Money. *Mich.* 1691. between *Bentham* and *Haincourt*.

3. If *A.* has a firſt Mortgage, and *B.* a ſecond, and ſubject to theſe Mortgages the Eſtate is ſettled on *C.* for Life, Remainder on *D.* an Infant; *A.* may bring a Bill to foreclоſe, though *B.* has not the like Remedy over againſt *D.* who becauſe of his Infancy cannot be foreclоſed. *Mich.* 1705. between *Draper* and *Jennings*, 2 *Vern.* 518.

4. If a firſt Mortgagee brings a Bill to foreclоſe the Mortgagor, and an Account is directed and taken between them, ſuch Account ſhall bind the Second Mortgagee, tho' he was no Party to the Bill, if there was no Fraud or Colluſion in the taking of it. *Trin.* 29 *Car.* 2. between *Needler* and *Deeble*, 1 *Chan. C.* 299.

5. If a Man mortgages certain Lands to one Man, and mortgages thoſe Lands, with ſome others to another, tho' this ſeems to be a Caſe omitted out of the Statute againſt clandeſtine Mortgages; yet if it appears to be a Contrivance to evade it, as if an Acre or two of Land were only added, this will not exempt it; but a Perſon who will take Advantage of the (*a*) Statute, muſt be an honeſt Mortgagee; and therefore if a Man has uſed any Fraud or Practice in obtaining

(*a*) By the 4 & 5 *W.* & *M. cap.* 16. if any Perſon ſhall borrow any Money &c. and for the Payment thereof ſhall ſuffer a Judgment or Recognizance, and ſhall afterwards borrow any other Sum of another, or for other valuable Conſideration, and for ſecuring the Repayment and Diſcharge thereof,

ing a ſecond Mortgage, he ſhall not have the Benefit of the Statute. 2 *Vern.* 589, 590.

thereof, ſhall mortgage Lands to the Second Lender, or to any other Perſon in Truſt for him, and ſhall not give Notice to the Mortgagee of ſuch Judgment, &c. in Writing before the Execution of the ſaid Mortgage, ſuch Mortgagor ſhall have no Benefit in Equity of Redemption of the Lands mortgaged, unleſs ſuch Mortgagor, or his Heirs, upon Notice given by the Mortgagee in Writing, under Hand and Seal, atteſted by two Witneſſes of ſuch former Judgment, &c. ſhall within ſix Months, pay off and diſcharge the ſame, and cauſe the ſame to be vacated and diſcharged. And if any Perſon who ſhall once mortgage Lands for valuable Conſideration, ſhall again mortgage the ſame Lands, or any Part thereof, to any other Perſon, the former Mortgage being in Force, and ſhall not diſcover in Writing to the ſecond Mortgagee the firſt Mortgage, ſuch Mortgagor ſhall have no Relief, or Equity of Redemption, againſt the ſecond Mortgagee, but ſuch ſecond or third Mortgagees may redeem any former Mortgage; this Act ſhall not extend to bar any Widow of any Mortgagor of her Dower, who did not legally join with ſuch Husband in ſuch Mortgage, or otherwiſe lawfully exclude herſelf.

6. If *A.* being about to lend Money to *B.* on a Mortgage, ſends *C.* to inquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Eſtate; and it is proved that *C.* went to him, and ſpoke to him accordingly, *D.*'s Mortgage ſhall be poſtponed. 2 *Vern.* 554. *vide* 2 *Vern.* 370.

7. One *Goff*, being poſſeſſed of the *Thatch'd Houſe* at St. *James*'s on a Building Leaſe for 60 Years, mortgages it to Dr. *Lancaſter*, and one *Habberfield*, for ſecuring 600 *l.* which the Defendant afterwards paid off, and advanced to *Goff* 600 *l.* more, and took an Aſſignment of this Mortgage, but had not the original Leaſe delivered to him, till ſome Days after the Aſſignment. *Goff* afterwards being in a declining Way, propoſed to borrow of the Plaintiff 350 *l.* on a Mortgage of a Vault and two Rooms, Part of the mortgaged Premiſſes; and on a Treaty for that Purpoſe, one *Remington*, who acted for the Plaintiff, deſired to ſee the Original Leaſe. *Goff* told him that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it ſafe to truſt them in his own Houſe, where all Sort of Company reſorted; upon which *Goff* goes to the Defendant, who was an Attorney in the City, tells him he was about agreeing with a Perſon for the Rebuilding Part of the Premiſſes, at ſo much a Foot Square, which would better his Security, and deſired him to let him have the Original Leaſe, that he may ſee the Dimenſions of the Houſe; the Defendant would not truſt him with the Leaſe in his own Power, but goes along with him to the *Thatched Houſe*; and after he had been there ſome Time, *Goff* ſends for the Plaintiff and *Remington*, told them he had now the Original Leaſe, which they might ſee; and upon their coming to his Houſe, *Goff* goes into the Room where the Defendant was, and deſires him to let him have the Leaſe, to ſhew the Perſon he had mentioned, for that he was now in the Houſe; and accordingly the Defendant lets him have the Leaſe, which he carries to the Plaintiff and *Remington*; and they being ſatisfied therewith lend him the Money, and took a Mortgage of the Vault and two Rooms, inſiſting at the ſame Time to have the Original Leaſe delivered to them; but *Goff* urging, that it concerned much more than the Plaintiff had in Mortgage, and that he could not part with it, the Plaintiff permitted him to keep it, and he thereupon in about an Hour's Time delivered it again to the Defendant, without acquainting him with what he had done; and the Defendant ſwore expreſly in his Anſwer, that he had no Notice of this Tranſaction, or of the Plaintiff's Mortgage. Afterwards the Plaintiff lent *Goff* a farther Sum of

Money, and prevailed on the Defendant to let him have the Original Leaſe a ſecond Time; but there was no Proof that the Defendant knew the Occaſion of it, and he by his Anſwer expreſly denied his having Notice of it. Afterwards *Goff* failed, and thereupon the Defendant brought his Ejectment, and recovered; and this Bill was brought to have the Defendant's Mortgage poſtponed, upon Pretence that here was a manifeſt Fraud on the Plaintiff, and that the Defendant was privy to it; and at the *Rolls*, the Plaintiff had a Decree accordingly, but on Appeal the Decree was reverſed; but my Lord Chancellor ſaid, if a Man makes a Mortgage, and afterwards mortgages the ſame Eſtate to another, and the firſt Mortgagee is in Combination to induce the ſecond Mortgagee to lend his Money, this Fraud without doubt will in Equity poſtpone his own Mortgage; ſo if ſuch Mortgagee ſtands by, and ſees another lending Money on the ſame Eſtate, without giving him Notice of his firſt Mortgage, this is ſuch a Miſpriſion as ſhall forfeit his Priority; but here is no Manner of Proof that the Defendant knew any Thing of the Plaintiff's Lending his Money; nay if there had, yet the Plaintiff appears Guilty of ſo much a groſſer Neglect, that he ought not to prevail; for the Defendant intruſted *Goff* with his Original Leaſe but for a very little while; the Plaintiff takes his Word that he could not part with it, and leaves it wholly in his Power, to go on in defrauding whom elſe he had a Mind to; beſides, it appears the Defendant was impoſed on by *Goff*; for he parted with the Leaſe only to better his own Security, and had the moſt ſpecious Pretence that could be for it; and therefore it cannot, without manifeſt Proof, be objected to him, that he let *Goff* have his Leaſe to ſhew the Plaintiff, or with a Deſign to draw in the Plaintiff to lend his Money, and diſmiſt the Bill with Coſts, unleſs the Plaintiff ſhould within ſuch a Time redeem the Defendant; and for Precedents were cited *Raw* and *Pott*, the Counteſs of *Bridgwater* and *Ruſſel*, and one *Clare*'s Caſe of *Yorkſhire*. *Mich.* 1716. between *Peter* and *Ruſſel*.

## (F) Where a Mortgagee may protect himſelf by buying in precedent Incumbrances.

1. IF a Man mortgages Land to *A.* and afterwards makes a ſubſequent Mortgage to *B.* without Notice at the Time of making the Mortgage, and *B.* purchaſes in a precedent Mortgage, which ſtands out at Law, tho' nothing on it be due in Equity, or a Statute, whereon Money is due, which he extends, he ſhall hold the Land till he is ſatisfied what is due upon both Securities, though he had Notice of *A.*'s Mortgage, before his ſecond Purchaſe of the prior Security; becauſe having at firſt innocently lent his Money, he may do what he can to ſecure that Money from being loſt; and when he hath purchaſed in the prior Incumbrance, he hath a Title at Law, and being equally on a valuable Conſideration with the mean Incumbrancer, it is but juſt that Equity ſhould leave it in the ſame Manner, that it ſtood at Law; for there is no Room for Equity to interpoſe, to take away the Security the Law had given, where the Perſon that has the Security comes into the Title without any Corruption at all; and it were Partiality and not Equity to interpoſe, where the Security gives the fair Lender a good and legal

Title; and it is all as one, whether ſuch third Lender, or Purchaſer, takes in a Mortgage, that is an Intereſt veſted, or a Statute that is only a Charge; for both are real Liens, and ſufficient to overthrow the Title of the Meſne Incumbrancer, or whether Money be due on the firſt Incumbrance, or not, ſince that does not alter the Legal Title. *Marſh* and *Lee*, 2 *Vent.* 337, 338. 1 *Chan. Ca.* 162, 163. *S. C.* 1 *Chan. Ca.* 36. *Hard.* 173. 1 *Chan. Ca.* 149, 150. 2 *Chan. Ca.* 208. 1 *Vern.* 187. 1 *Chan. Ca.* 20, 166. 2 *Vern.* 157, 159.

2. A Man mortgages the Manor and Rectory of *D.* to *A.* and afterwards mortgages the Rectory to *B.* without Notice of the Mortgage to *A.* and then *B.* purchaſes in a precedent Incumbrance on both the Manor and Rectory; and the Queſtion was, when *B.* had received all the Money due on the firſt Security, whether he ſhould receive any more Profits of the Manor, or only keep the Incumbrance on Foot, to protect the Rectory; which was argued before *Finch* Lord *Keeper*, in the Preſence of *Wild* and *Twiſden*; and the two Judges held, that *B.* ſhould not receive the Profits of the Manor, after the firſt Incumbrance was ſatisfied, becauſe he had taken the Rectory only for his Security of that Sum; and it would be unreaſonable to give him a Security beyond what he had in his Original Intention; but the *Keeper* over-ruled it; for that when he had purchaſed the precedent Incumbrances, that comprehended both the Manor and Rectory, and were forfeited at Law, and therefore it was reaſonable, that the Eſtate ſhould not be taken away by the Meſne Incumbrancer in a Court of Equity, which by no Method could be evicted at Law, unleſs ſuch Perſon would do Equity, and pay the whole Money due on both Securities. 1 *Chan. Ca.* 201, 202.

3. If a Man lends 600*l.* on a Mortgage, and afterwards diſcovering, that the Eſtate is premortgaged to *J. S.* he gets in an old ſatisfied Incumbrance, and brings his Bill againſt *J. S.* to redeem, or be foreclоſed; he need not prove the actual Payment of any Money for ſuch precedent Incumbrance; the having the Deed, or an Acquittance, being ſufficient, altho' it is objected, that *J. S.* is equally a Purchaſer with him. 2 *Vern.* 279.

4. If a prior Mortgage or Statute be bought in, pending a Bill brought by *A.* againſt the Mortgagor and *B.* who buys in ſuch precedent Statute or Mortgage, to foreclоſe, tho' this Purchaſe be *pendente lite*, yet it will protect *B.* he being at Liberty to do what he can for his own Security. *Trin.* 1687. between *Taylor* and *Leigh*, 2 *Vern.* 29.

5. But where *A.* made a Mortgage to *B.* and afterwards a Commiſſion of Bankruptcy was taken out againſt him, and the Commiſſioners made an Aſſignment of his Eſtate, and then *C.* lent the Bankrupt 2000*l.* on a ſecond Mortgage, having no Notice of the Bankruptcy, tho' he afterwards got in the firſt Mortgage; yet it was held by two Lords *Commiſſioners* againſt one, that this prior Mortgage ſhould not protect the Mortgage ſubſequent to the Bankruptcy; for every one is bound to take Notice of a Commiſſion of Bankruptcy. 2 *Vern.* 157, 160.

6. And tho' a Purchaſer or Mortgagee may buy in an Incumbrance, or lay hold on any Plank to protect himſelf, yet he ſhall not protect himſelf by the Taking a Conveyance from a Truſtee after he had Notice of the Truſt; for by Taking ſuch Conveyance he becomes the Truſtee himſelf. *Vide* 2 *Vern.* 271.

## (G) Where a Perſon who comes to redeem muſt do Equity to the Mortgagee before he Will be admitted.

1. IF a Mortgagor borrows more Money of the Mortgagee upon Bond, where the Heir is bound, and dies, the Heir of the Mortgagor ſhall not redeem without paying the Bond-Debt, as well as that ſecured by the Mortgage; becauſe, when the Condition is broken, ſo that the Term or Intereſt becomes abſolute in the Mortgagee, if the Heir of the Mortgagor will have Equity, he muſt do Equity, by the Payment of the whole Money due to the Mortgagee; and this is called a *Rebutter*; but if the Bill was exhibited by the Mortgagee to foreclose; there, if the Heir of the Mortgagor tender Principal and Coſts, it ſufficeth without Tender of the Money due on the Bond, becauſe ſuch Bond was not originally any *Lien* on the Land itſelf; and if that be tendred, for which the Land was originally pledged, there is no Reaſon to debar the Heir of his Right of Redemption. 2 *Chan. Ca.* 164. 2 *Chan. Rep.* 247. 1 *Vern.* 245. 2 *Chan Ca.* 194, 195.

2. So where a Husband and Wife levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 *l.* and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage-money, but afterwards borrows again the ſame Sum of the Mortgagee; and it was decreed, that the Mortgagee having the Eſtate in Law in him by the Forfeiture of the Mortgage, he ſhould hold the Land againſt the Heir of the Wife until the whole Money was paid; and if the Heir would not pay in the whole Principal, Intereſt and Coſts, he ſhould be foreclosed. *Paſch.* 1682. between *Reaſon* and *Sacheverell*, 1 *Vern.* 41.

3. So if a Leſſee for Years mortgages his Term, and afterwards borrows Money of the Mortgagee on Bond, and dies, his Executor ſhall not redeem without paying the Bond as well as the Mortgage. 2 *Vern.* 177.

4. The Plaintiff pawned ſome Jewels to *K.* who ſigned a Writing that they were to be redeemed in twelve Months, otherwiſe for the 110 *l.* lent, they were to be as bought and ſold; *K.* within a ſhort Time after delivers over the Jewels, together with ſome Plate of his own, to *M.* a *Bookſeller*, as a Pledge for 200 *l.* and *K.* afterwards borrowed 38 *l.* and 50 *l.* of *M.* on promiſſory Notes, to be repaid on Demand, and *M.* by Anſwer inſiſted, it was agreed, that the Pledge ſhould be a Security, as well for the Money on the Notes as for the Money firſt lent, but could make no Proof of any ſuch Promiſe or Agreement; and though a Redemption was decreed, yet it was on Payment of all that was due to *M.* as well upon the Notes as on the Pawns; but the Goods of *K.* which were pawned, were to be firſt applied as far as the Value of them would extend. *Mich.* 1715. between *Demainbray* and *Metcalf*, 2 *Vern.* 698, 691. *S. C.*

5. If *A.* is bound in ſeveral Bonds with *B.* as his Surety for 4000 *l.* and *A.* conveys the Manor of *C.* to *B.* by Way of Mortgage, to counter-ſecure him againſt the Bonds for 4000 *l.* and *A.* dies, and after *D.* the Son and Heir of *A.* becomes bound with *B.* for 2000 *l.*

more; but there was no Agreement that the Mortgage ſhould be a Security to *D.* againſt the Bonds for 2000*l.* and after *B.* dies, his Heir ſhall not be permitted to redeem upon Payment of the 4000 *l.* only, but muſt ſave *D.* harmleſs, as well touching the 2000 *l.* as the 4000 *l.* for he that would have Equity help where the Law cannot, muſt do Equity to the Party againſt whom he ſeeks to be relieved. *Hill.* 19 & 20 *Car.* 2. between *St. John* and *Holford*, 1 *Chan. Ca.* 97.

6. If *A.* acknowledges a Statute to *B.* for Payment of 800 *l.* with Intereſt, which being forfeited, and the Lands extended upon it, *A.* for a valuable Conſideration, ſettles the ſame Lands in Tail, and after borrows Money of *B.* and by Articles it is agreed, the Statute and Extent ſhall ſtand a Security for the laſt Money, and after *A.* dies, and the 800 *l.* with Intereſt is ſatisfied by Reception of the Profits, yet the Iſſue in Tail ſhall not be relieved againſt the Penalty of the Statute; for though the Heir has an Equity, by Reaſon of the Tail made upon a Conſideration, yet the Money lent raiſes an Equity for *B.* ſo that *B.* hath both Law and Equity; whereas the Iſſue in Tail hath Equity only till the Penalty is ſatisfied. *Mich.* 14 *Car.* 2. between Sir *John Hedworth* and *Primate*, *Hard.* 318.

7. If a Man makes two ſeveral Mortgages of ſeveral Lands, and dies, and one of the Mortgages is of an intailed Eſtate, or is deficient in Value, the Heir of the Mortgagor ſhall not be admitted to redeem one without the other; 2 *Vern.* 207. neither ſhall the Mortgagor himſelf redeem the one, and leave the defective Mortgage, but he muſt take both together. 1 *Vern.* 29, 245. *S. C.*

8. The Plaintiff, as Aſſignee of a Statute of Bankruptcy, brought his Bill to redeem a Mortgage of the Manor of *Newington* in *Kent*, made by the Bankrupt to the Defendant; the Defendant, by Anſwer, inſiſted, that he firſt lent the Bankrupt 200 *l.* on a Mortgage of a particular Tenement, and afterwards lent him 300 *l.* on a Mortgage of the Manor of *Newington*, which was of better Value than the Money due; but the firſt Mortgage was deficient in Point of Value; and it was held, that if the Plaintiff will redeem one, he muſt redeem both. *Hill.* 1692. between *Pope* and *Onſlow*, 2 *Vern.* 286.

9. If a Man has a Debt owing to him by Mortgage, and another on Bond from the ſame Perſon, he cannot tack them together againſt the Mortgagor, but he ſhall be let into a Redemption, on Payment of the Mortgage-money (*a*) only; but the Heir in ſuch Caſe ſhall not be let into a Redemption without Payment of both, becauſe the Land in his Hand is chargeable with the Bond, even at Law; and ſince the (*b*) Statute againſt fraudulent Deviſes, the Deviſee of the Equity of Redemption is in the ſame Caſe with the Heir, and cannot redeem without Payment of both, becauſe the Statute makes ſuch Deviſe void as againſt Creditors, and then the Deviſee ſtands in the ſame Place as the Heir muſt have done, if no Deviſe had been made; but before that Statute ſuch Deviſee would not be liable to the Bond-Debt. *Trin.* 1 *Geo.* 1. between *Challis* and *Casborn.*

(*a*) *Vid.* 1 *Vern.* 244. Where it is held, that the Mortgagor himſelf muſt pay both Bond and Mortgage; but *Q.* and whether there be any Difference when the Mortgagor comes to redeem, and when the Mortgagee brings a Bill to foreclose.

(*b*) That the Vendee or Deviſee of the Equity of Redemption was not obliged to pay both before the Statute againſt fraudulent Deviſes, was Reſolved *Hill.* 1698. between *Baily* and *Robinſon.*

10. *A.* mortgaged his Eſtate to *B.* and then aſſigned the Equity of Redemption to *C.* afterwards *D.* obtained a Judgment againſt *A.* and *B.* the Mortgagee aſſigns to *D.* his Mortgage, and then *C.* tenders

ders the Money due on the firſt Mortgage to *D.* who had Notice of the Aſſignment of the Equity of Redemption, upon his purchaſing in his firſt Mortgage; and it was here objected, that *D.* having the legal Eſtate in him by the Aſſignment of the forfeited Mortgage, and *C.* having only an equitable Intereſt, not ſupported by the legal Eſtate, that if *C.* would have Equity, he ought to do Equity, by paying off both Monies to *D.* But it was anſwered and reſolved by the Court, that *C.* ſhould redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment, becauſe the Equity of Redemption was never bound by the Judgment, for the Judgment was not confeſſed, ſo as to become a real *Lien* upon the Eſtate at the Time when this Equity was aſſigned; and therefore the Judgment could never charge or affect it, and conſequently *C.* purchaſed an Eſtate, not bound by the Judgment, and by Conſequence the Judgment-Creditor, by purchaſing in the Prior Mortgagor, could never defeat the Intereſt of *C.* *Trin.* 1708. between *Breerton* and *Jones*, at the *Rolls*.

11. It was alſo declared, that if a Perſon that had a firſt Mortgage ſhould, without the Conſent of the Mortgagor, purchaſe in a ſubſequent Judgment, that a meſne Mortgagee or Aſſignee of the Equity of Redemption ſhould not be obliged to pay the Money due on both Securities, in order to redeem; becauſe ſuch Tranſactions of the Mortgagee was only to load the Eſtate without the Conſent of the Owner, when he had no Proſpect of bettering his own Security. Between *Brereton* and *Jones*.

12. If the Father is Tenant for Life, Remainder to his Son in Tail, and the Father mortgages to *J. S.* who finding his Title defective ſends 100 *l.* to the Son, and takes a Mortgage from him of the ſame Land, *&c.* the Son may redeem, paying the 100 *l.* only, for the Son is a Stranger to the Eſtate of his Father. *Hill.* 31 & 32 *Car.* 2. between *Bromley* and *Hamond*, 2 *Chan. Ca.* 23.

13. So where a Lunatick, before he became ſuch, made a Mortgage of good Part of his Eſtate for 50 *l.* and the Committee tranſferred this Mortgage, and took up 3 or 400 *l.* more upon it; and my Lord *Chancellor* declared the Mortgage ſhould ſtand a Security for the 50 *l.* only. *Mich.* 1684. between *Foſter* and *Merchant*, 1 *Vern.* 262.

## (H) Mortgage-money, to whom to be paid.

1. WHere a Mortgage was made upon Condition that the Mortgagor paid a certain Sum to the Mortgagee, his Heirs, Executors or Adminiſtrators, that then the Mortgagor ſhould re-enter, and the Day paſſed without Payment, and the Mortgagee died; great Doubt was, whether the Money ſhould be paid to the Heir or Executor of the Mortgagee; and it was formerly held, that where the Heir was named in the Condition, and no Bond or Covenant given to make it appear a Perſonal Matter; and there was no Deficiency of Aſſets to pay Creditors; that in ſuch Caſe the Heir, parting with the Benefit deſcended to him, ſhould have the Money on the Mortgage. 1 *Chan. Ca.* 88. 1 *Chan. Rep.* 181, 182-3.

2. But afterwards it was truly ſettled in ſeveral Caſes by my Lord Chancellor *Finch*, that the Money ſhould go to the Executors or

Adminiſtrators, and not to the Heir; and the Reaſon was, becauſe Equity follows the Law; and at Common Law, if Conditions or Defeaſances of Mortgages are ſo penned, as no Mention is made either of Heirs or Executors, in that Caſe the Money ought to be paid to the Executors, becauſe the Money came out of the Perſonal Eſtate, and therefore ought to return thither again; but if the Defeaſance appoints the Money to be paid to the Heir or Executor diſjunctively, if the Mortgagor pay the Money preciſely at the Day, he may elect to pay it either to the Heir or the Executor; but where the preciſe Day is paſt, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no Redemption; and when the Caſe is reduced to an Equity of Redemption, it were perfectly againſt Equity to revive the Election of the Mortgagor, becauſe that would only tend to the Delay of the Payment of the Money as long as he pleaſed, and end in Compoſitions to pay the Money into that Hand which would uſe him beſt; and to ſay that the Election ſhould be in the Court, would be to place an Arbitrary Power in it, which would tend to the Inconvenience of the Subject, ſince no Man could ſafely pay the Money in ſuch Caſes, without applying to the Court in a Suit in Equity; and therefore ſince there ought to be a certain Rule, a better cannot be choſe, than to come as near as can be to the Rule and Reaſon of the Common Law; and as the Law always gives the Money to the Executor, where no Perſon is named, or where the Election to pay, either to the Heir or Executor, is gone and forfeited in Law, it is all one as if neither Heir nor Executor were named in the Condition; and then Equity following the Rules of the Common Law, ought to give it to the Executor; for in natural Juſtice and Equity, the principal Right of the Mortgagee is to his Money, and his Right to the Land is only as a *Depoſit* or Pledge for his Money; and therefore the Money ought to be paid to the proper Hand that the Mortgagee has appointed Receiver of it; and that is his Executor; and then the Heir, who is only a Truſtee to keep the Pledge, ought to deliver it back to the Mortgagor; and though the Heir has the Uſe and Benefit of the Land till redeemed; yet he has it only as a Pledge, and therefore is a Truſtee to reſtore it when the Money is paid to the proper Hand; and the Heir himſelf, though he be proper to keep the Pledge, being Land, yet he is not proper to receive the Money, it being purely perſonal; and it is not hard that the Heir ſhould part with the Land, without having the Money that comes in Lieu of it, becauſe the Money was originally parted with from the Perſonal Eſtate, and had immediately come into the Hands of the Executor, had it not been placed out on this real Security; and therefore it has ſince been decreed, whether the Executor has Aſſets, or not, that the Mortgage-money ſhould be paid him. 1 *Chan. Ca.* 283. 2 *Chan. Ca.* 50, 51, 220. 2 *Vent.* 348, 351. 1 *Chan. Rep.* 183. 2 *Chan. Rep.* 155, 242. 1 *Chan. Ca.* 88. *Hard.* 467. 1 *Vern.* 170, 412.

3. If the Heir of the Mortgagee foreclоſes the Mortgagor, the Executor being no Party, upon a Bill by the Executor againſt the Heir of the Mortgagee and the Mortgagor, the Land will be decreed the Executor. Between *Gobe* and the Earl of *Carliſle*, 2 *Vern.* 66. cited to be adjudged.

4. But

4. But if the Executor of the Mortgagee, after a Foreclosure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take the Benefit of the Foreclosure to himself, paying the Executor the Mortgage-money and Interest. 2 *Vern.* 67. *per Curiam.*

5. If there be a Mortgage in Fee of a long Standing, and there are two Descents cast since the Mortgage was made; and though the Mortgagor, by Answer, says he will not redeem, yet the Mortgage should go to the Executor, and not the Heir, the Equity of Redemption not being foreclosed or released. Between *Tabor* and *Greaves*, 2 *Vern.* 367.

6. But if a Mortgagee in Fee enters for a Forfeiture, and after seven Years Enjoyment, absolutely sells the Land to *J. S.* and his Heirs; the Estate shall not be looked upon to be a Mortgage in the Hands of *J. S.* so as to make it Part of his Personal Estate; but it shall be for the Benefit of his Heir. *Mich.* 1684, between *Cotton* and *Iles*, 1 *Vern.* 271.

## (I) Mortgagee answerable for the Profits and how to Account.

1. THE Mortgagee is answerable in Equity when he comes into the Possession of the Lands, for the Profits that he made of the Lands, and not for the Profits that he might have made, unless there were Fraud; for it is the Fraud and Laches of the Mortgagor, that he would let the Lands lapse into the Hands of the Mortgagee by the Non-payment of the Money; and when it doth, he is only a Bailiff for what he doth receive; but is not bound to the Trouble and Pains of making the best of what is another's. *Toth.* 133. 1 *Vern.* 476, 477.

2. If a Mortgagee in Possession assigns over his Mortgage, without Assent of the Mortgagor, the Mortgagee is bound to answer the Profits, both before and after the Assignment, though assigned only for his own Debt; for he is under a Trust to answer the Profits of the Pledge; and it is a Breach of Trust to assign such Pledge to a Person insolvent; but *quære*, if the Mortgagor hides, so that he cannot be served with a *Subpœna* to foreclose, whether the Mortgagee may not assign, and not be answerable for the Profits after Assignment. 3 *Chan. Ca.* 3.

3. A Mortgagee shall not be bound by any Proof, that the Land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful Default; as if he turned out a sufficient Tenant, that held it at so much Rent, or refused to accept a sufficient Tenant that would have given so much for it. 1 *Vern.* 45.

4. If a Mortgagee manages the Estate himself, there is no Allowance to be made him for his Care and Pains; but if he employs a skilful Bailiff, and gives him 20 *l. per Ann.* that must be allowed; for a Man is not bound to be his own Bailiff. 1 *Vern.* 316.

5. If an Infant, by his Guardian, endeavours to overthrow the Mortgage, by a supposed Intail, and after a special Verdict and great Agitation at Law, the Mortgagee prevails, and the Infant brings his

Bill to redeem, the Mortgagee having ſworn he paid and expended above 120*l.* in defending his Mortgage at Law, although he had but 60*l.* Coſts allowed him there, ſhall not be held down to the Taxation at Law, but ſhall, on the Account, be allowed all he laid out or expended; and if the Mortgagee, in this Caſe, fearing that his Mortgage would be defeated at Law, gets Adminiſtration as Principal Creditor, in the Spiritual Court, he ſhall be allowed the Coſts expended there alſo. *Hill.* 1705. between *Ramſden* and *Langley*, 2 *Vern.* 536.

6. The Mortgagee obtained Judgment in Ejectment, and entred on the Mortgaged Premiſſes, and thereby prevented other Creditors, that had ſubſequent Incumbrances, from entring, and yet permitted the Mortgagor to take the Profits; and the other Incumbrancers coming to redeem him, the Court ordered the Mortgagee ſhould be charged with all the Profits he had, or might have, received ſince his Entry. 1 *Vern.* 270.

7. So where a Bankrupt, before he became ſuch, having made a Mortgage of his Eſtate, and the Aſſignees of the Statute brought an Ejectment for Recovery of the Lands comprized in the Mortgage, and the Mortgagee refuſed to enter, but ſuffered the Bankrupt to take the Profits, and to fence againſt the Aſſignees with the Mortgage; and it was held, that the Mortgagee ſhould be charged with the Profits from the Time of the Ejectment delivered. *Mich.* 1684. between *Chapman* and *Tanner*, 1 *Vern.* 267, 258. *S. P.*

8. *A.* mortgaged the Manor of *T.* to *B.* to which an Advowſon was appendant, *B.* brought a Bill to foreclоſe, the Church became void, and he likewiſe brought a *Quare Impedit* at Law; and on a Motion to ſtay the Proceedings on the *Quare Impedit*, the Court held, that though *A.* had no Bill, yet being ready, and offering to pay the Principal, Intereſt and Coſts, if *B.* will not accept his Money, Intereſt ſhall ceaſe; and an Injunction to ſtay Proceedings in the *Quare Impedit* granted; for the Mortgagee can make no Benefit by Preſenting to the Church, nor can Account for any Value in Reſpect thereof, to ſink or leſſen his Debt; and the Mortgagee therefore in that Caſe is but in the Nature of a Truſtee for the Mortgagor. *Mich.* 1700. between *Amhurſt* and *Dawling*, 2 *Vern.* 401.

## (K) How the Aſſignee of the Mortgagee is to Account.

1. IF the Mortgagee aſſigns his Mortgage, and the Mortgagor comes to redeem againſt the Aſſignee, all Monies really paid by the Aſſignee, either as Principal or Intereſt, ſhall be Principal to the Aſſignee, and ſhall bear Intereſt; otherwiſe it is if the Aſſignee had not paid the Money; and the Aſſignment was only colourable, in order to load the Mortgagor with Compound Intereſt. Between *Smith* and *Pemberton*, 1 *Chan. Ca.* 67, 258. 1 *Vern.* 169. 2 *Vern.* 135.

2. If a Stranger gets an Aſſignment of a Mortgage for leſs than is due, the Mortgagor or his Heir ſhall not redeem, without paying all the Money due; but if a Man purchaſes the Mortgaged Lands, without Notice of this Incumbrance; whether he has not an Equity to redeem them, for what was really paid by the Stranger, *Quære* 1 *Vern.* 336.

3. But if there are ſubſequent Incumbrancers or Creditors in the Caſe, a Man who buys in a prior Incumbrance, ſhall againſt them be allowed only what he really paid, though there was in Truth a greater Sum due. 1 *Vern.* 476.

# CAP. XLII.

## Notice.

(A) Of preſumptive Notice, and where Notice to one Perſon ſhall affect another.

(B) How far a Man is affected who acts againſt expreſs Notice, or contrary to what he is obliged to take Notice of at his Peril.

(C) Purchaſers without Notice, in what Caſes favoured.

### (A) Of preſumptive Notice, and where Notice to one Perſon ſhall affect another.

1. IF *A.* having Notice that Lands were contracted to be ſold to *B.* purchaſes thoſe Lands, and takes a Conveyance to the Son and his Heirs; tho' the Son had not Notice of *B.*'s Contract; yet Notice to his Father ſhall affect him. *Mich.* 15 *Car.* 2. between *Abney* and *Kendal*, 1 *Chan. Ca.* 38.

2. So if one who purchaſeth for another hath Notice of a dormant Incumbrance, it ſhall affect the very Purchaſer. 1 *Chan. Ca.* 38. *per Curiam.*

3. If a Man lends Money on a Mortgage, and the Scrivener, who was intruſted to draw the Mortgage-Deed, had Notice of a prior Mortgage, this Notice ſhall affect the ſecond Mortgagee. *Vide* 2 *Vern.* 574.

4. So if *A.* having Notice of an Incumbrance, purchaſes in the Name of *B.* and then agrees that *B.* ſhall be the Purchaſer, and he

5. accord-

accordingly pays the Purchaſe-money without Notice of the Incumbrance; tho' *B.* did not employ *A.* nor knew any Thing of the Purchaſe till after it was made, yet *B.* approving of it afterwards, made *A.* his Agent *ab initio*, and therefore ſhall be affected by the Notice to *A.* 2 *Vern.* 609.

5. *A.* purchaſed Lands, having Notice of a Settlement, which was delivered to him amongſt other Writings, whereby it appeared, that the Vendor was but Tenant for Life, Remainder to his firſt, *&c.* Sons in Tail Male; upon his Purchaſe he took in a Mortgage Term, which was prior to the Settlement, and entred, and afterwards ſold the Lands to *B.* and *C.* who had Notice; upon a Bill brought by the Son, after the Death of his Father, who was but Tenant for Life, againſt *B.* and *C.* his two Vendees, it was decreed, that as to the two Vendees, who were Purchaſers without Notice, the Bill ſhould be diſmiſſed, and that *A.* ſhould account for the Purchaſe Money, which he received, with Intereſt, from the Death of the Tenant for Life, thereout diſcounting what was due on the Mortgage Term, made prior to the Settlement. *Mich.* 1700. between *Ferrars* and *Cherry*, 2 *Vern.* 384.

6. *A.* purchaſed an Eſtate with Notice of an Incumbrance, and then ſold it to *B.* who had no Notice, who afterwards ſold it to *C.* who had Notice; and it was held by the Maſter of the *Rolls*, that by this, the firſt Notice to *A.* the firſt Purchaſer was revived, and that *C.* the laſt Purchaſer ſhould be liable to the Incumbrance, as if the Lands had never been in the Hands of one who had no Notice; but upon a Rehearing, my Lord *Keeper* reverſed it; for otherwiſe an Innocent Purchaſer without Notice, muſt be forced to keep the Eſtate and cannot ſell it. *Hill.* 1695. between *Harriſon* and *Forth.*

7. *A.* makes a Conveyance to *B.* with Power of Revocation by Will, and limits other Uſes; if *A.* diſpoſe to a Purchaſer by the Will, another Purchaſer ſubſequent is intended to have Notice of the Will, as well as of the Power to revoke; and this is in Law Notice; and ſo it is in all Caſes, where the Purchaſer cannot make out a Title, but by a Deed, which leads him to another Fact, the Purchaſer ſhall not be a Purchaſer without Notice of that Fact, but ſhall be preſumed cogniſant thereof; for it is *craſſa Negligentia*, that he ſought not after it. *Mich.* 30 *Car.* 2. between *Moor* and *Bennett*, 2 *Chan. Ca.* 246. 1 *Vern.* 149, 319. *S. P.* 2 *Vern.* 662. *S. P.*

## (B) How far a Man is affected who acts againſt expreſs Notice, or contrary to what he is obliged to take Notice of at his Peril.

1. *A.* Made *B.* and *C.* his Executors, and died; *C.* obtained a Decree againſt *B.* to hinder him from receiving any more of the Perſonal Eſtate, *&c.* and a perpetual Injunction for that Purpoſe was granted before any Sequeſtration againſt *B. F. S.* who was indebted by a Mortgage of 1000 *l.* to the Teſtator, paid the 1000 *l.* to *B.* and has his Mortgage delivered up to be cancelled; but it appearing, that he paid the Money after Notice of the Decree, (being preſent at the Hearing, *&c.*) he was ordered to pay it over again. *Trin.* 34 *Car.* 2. between *Harvey* and *Mountague*, 1 *Vern.* 57, 122. *S. C.*

2. If

2. If *A.* lends *B.* her Brother-in-law 100 *l.* and takes Bond for it in the Name of *J. S.* and upon ſome Difference between *A.* and *B.* *A.* puts the Bond in Suit, in the Name of *J. S.* her Truſtee, and *B.* to avoid Expence confeſſes Judgment, and afterwards pays the Money to *J. S.* the Truſtee, he ſhall be obliged to pay it over again, having Notice of the Truſt; and it is ſufficient Evidence of Fraud and Notice, that there was a new Attorney made to acknowledge Satisfaction on the Judgment, and not the Attorney on Record, who was firſt employed by *A. Mich.* 1690. between *Pritchard* and *Langher*, 2 *Vern.* 197.

3. If a Man has a Debt due to him by Bond, and he aſſigns the Bond to *J. S.* and the Obligor, after Notice of the Aſſignment, pays the Money to the Obligee, ſuch Payment is not good. 2 *Vern.* 540. but if he had paid it without Notice of the Aſſignment, it would be otherwiſe. 1 *Chan. Ca.* 232.

4. An Adminiſtrator pays Money on Specialties, without Notice of Money decreed, and had fully adminiſtred the Aſſets; and the Court nevertheleſs decreed, that the Adminiſtrator ſhould pay the Money. Decreed *Hill.* 1688. between *Searle* and *Hale*, 2 *Vern.* 37, 88. *S. P.* for a Duty decreed is equal to a Judgment at Law.

5. If a Deviſee obtains a Decree, to hold and enjoy certain Lands againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will, and pending this Suit, a third Perſon gets an Aſſignment of a Mortgage made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir, with Notice that there was ſuch a Will, the Court will not admit him to examine the Juſtice of the former Decree, nor to try at Law, whether ſuch Will was cancelled or deſtroyed by the Teſtator. *Hill.* 1690. between *Finch* and *Newnham*, 2 *Vern.* 216, 217.

6. A Purchaſer or Mortgagee ſhall not protect himſelf, by taking a Conveyance from a Truſtee, after Notice of the Truſt; for by taking ſuch a Conveyance he becomes the Truſtee himſelf. 2 *Vern.* 271. So if a Man purchaſes from a Truſtee with Notice, and levies a Fine, and five Years paſs, yet it ſhall not avail; for by Purchaſing from the Truſtee with Notice, he becomes the Truſtee himſelf. 1 *Vern.* 149.

7. If an Executor in Truſt for an Infant, Reſiduary Legatee, renews a Leaſe, Part of the Teſtator's Perſonal Eſtate, in his own Name, and afterwards mortgages it, and aſſigns the Equity of Redemption to a Truſtee, to ſell for Payment of his own Debts, and the Truſtee ſells to one who had Notice of the Infant's Title, the Purchaſe will be ſet aſide. 1 *Vern.* 484.

8. A Man who lends Money to a Bankrupt, after a Commiſſion ſued out againſt him, but before actual Notice of it, cannot come in under the Statute as a Creditor; by two Lords *Commiſſioners* againſt one who doubted. 2 *Vern.* 157.

9. The Earl of *Newport* had two Daughters, and he deviſed *Newport Houſe* to the Daughter of his eldeſt Daughter in Tail, which ſhe had by the Earl of *Banbury*; provided, and upon Condition, that ſhe marry with the Conſent of her Mother and two other Truſtees, or the major Part of them; if not, or if ſhe ſhould die without Iſſue, then he deviſed the ſaid Houſe to one *Porter* in Fee. The Lady *Anne Knowles*, the firſt Deviſee, married *Fry*, without the Conſent of her Grandmother or Truſtees; and it was adjudged againſt

her, upon Point of Notice, that it was not neceſſary, becauſe her Grandfather had not appointed any Perſon to give Notice; and he might have impoſed any Terms or Conditions upon his own Eſtate; and all parties concerned had the ſame Means to inform themſelves of ſuch Conditions. Between *Fry* and *Porter*, adjudged in *C. B.* 1 *Vent.* 199. 2 *Lev.* 21. *S. C.* 3 *Keb.* 19. *S. C.* and in Chancery, 1 *Chan. Ca.* 142. 1 *Mod.* 86, 300.

10. But if Lands are conveyed or deviſed to an Heir at Law, upon Condition, as he has a more Worthy Title which is by Diſcent, expreſs Notice muſt be given him thereof. 8 *Co.* 9. *Frances*'s Caſe. 3 *Mod.* 28, 29 *Mallon* and *Fitzgerald.*

## (C) Purchaſers Without Notice, in What Caſes favoured.

*Vid.* Title *Purchaſe* and *Purchaſer.*

1. A Man who purchaſes without Notice of any prior Incumbrance, or on any prior Right to the Eſtate, ſhall not have his Title impeached in Equity; neither ſhall he be compelled to diſcover any Writings, *&c.* which may weaken his Title; nor ſhall he have any Advantage taken from him, by which he may defend himſelf at Law. *Nel. Chan. Rep.* 9, 34, 35. 2 *Chan. Ca.* 47, 48. 2 *Vern.* 599, 701. he muſt plead himſelf a Purchaſer without Notice. 1 *Vern.* 179. but he need not ſet forth the Conſideration he paid. 1 *Chan. Ca.* 34.

2. A Bill was exhibited to prove a Will, and perpetuate the Teſtimony of Witneſſes; the Defendant pleaded himſelf a Purchaſer without Notice of any ſuch Will, and inſiſted, that unleſs there had been a Verdict in Affirmance of ſuch Will, (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law) the Plaintiff ought not to be admitted to examine his Witneſſes, thereby to hang a Cloud over a Purchaſer's Eſtate; and upon Debate the Court allowed the Plea. *Hill.* 1 *&* 2 *Jac.* 2. between *Bechinal* and *Arnold*, 1 *Vern.* 354.

3. Tenant for Life, Remainder to his firſt Son, mortgaged for 1500*l.* the Deed of Settlement was then produced, and ſeen by the Purchaſer, who notwithſtanding lent the Money, being adviſed, that Tenant for Life, not having then any Son born, could deſtroy the Contingent Remainders, whereas in Truth there was a Son born five Days before the Lending of the Money; but the Mortgagee having no Notice thereof, and having got the Deed of Settlement, the Court would not relieve againſt the Purchaſer, but diſmiſſed the Bill. *Trin.* 1671. between *Brampton* and *Barker*, 2 *Vern.* 159. cited by Lord *Rawlinſon.*

4. The Plaintiff's Bill was to ſet aſide a Conveyance made to the Defendant by *A.* and that the Defendant was no real Purchaſer; or if he were, yet before his Purchaſe he had Notice, that the Eſtate was ſubject to a Truſt for the Plantiff; and that ſuch a Leaſe in the Defendant's Cuſtody mentions it. Defendant ſwears himſelf a Purchaſer without Notice of any Truſt, and that the ſaid Leaſe mentions no ſuch Truſt. Plaintiff replies, and the Defendant proves his Purchaſe, and the Plaintiff proves no Notice upon him; but at the Hearing inſiſted he ought to produce the Leaſe, to ſhew there was no ſuch Mention of the Truſt; and the Defendant inſiſting he

was not obliged to produce it, he being a Purchaſer; for the Plaintiff it was argued that he ought to produce it, becauſe his Anſwer being replied to, he ought to prove it, which without ſhewing the Deed he cannot; and he takes upon him to judge what Deed will amount to Notice, and what not; which he ought not to do; for implied Notice is as ſtrong as expreſs Notice; and if the ſaid Leaſe mentions only the Date, and Parties of another Deed which mentions a Truſt, 'tis an implied Notice, which the Defendant may not know, and therefore ought to produce it, that the Court may judge of it. On the other Side it was ſaid, that by the conſtant Rules of this Court, a Purchaſer was not obliged to ſhew his Title; and this is an Attempt to alter that Rule by a ſide Wind; and 'tis as eaſy in a Bill to ſay it is in ſome of the Deeds, as in any one in Particular, and then he muſt expoſe them all, which would be of dangerous Conſequence to Purchaſers. 'Twas replied, if the Deed be not to be produced, then, if one has a Mortgage with a proviſo of Redemption, yet if the Mortgagee will be ſo hardy as to ſwear it an abſolute Purchaſe, and the Mortgagor has no Counterpart, he muſt loſe his Eſtate. The Maſter of the *Rolls* thought, as this Caſe is, it ought to be produced; but my Lord *Keeper* held otherwiſe; and he ſaid it was but a ſide Wind to make a Purchaſer expoſe his Title, and would not do it, unleſs the Plaintiff had made ſome Proof towards Falſifying his Anſwer, to induce him to it. *Mich.* 1704. between *Hall* and *Atkinſon*.

5. But where a Defendant pleaded himſelf a Purchaſer for valuable Conſideration, and denied by way of Anſwer, that he had Notice of the Plantiff's Title at the Time of his Purchaſe or Contract, and the Plea was over-ruled; for an evaſive Denial is not ſufficient; and here the Word *Purchaſe* might be underſtood, when the Contract for the Purchaſe was made; and it might be he had no Notice then, and might have Notice after, before or at Sealing the Conveyance. *Mich.* 15 *Car.* 2. between *Moor* and *Mayhow*, 1 *Chan. Ca.* 34.

6. A Purchaſer for valuable Conſideration ſhall hold, or take Place, againſt a prior voluntary Settlement, tho' he had expreſs Notice thereof at the Time of his Purchaſe, ſuch voluntary Settlement by 27 *Eliz.* being made void againſt a Purchaſer, with or without Notice. *Mich.* 1727. between *Tonkins* and *Ennis*; *per Cur.*

## CAP. XLIII.

# CAP. XLIII.

# Portions.

(A) Portions and Provisions for younger Children made good in Equity.
(B) At what Time Portions shall be raised, or Reversionary Estates or Terms sold for that Purpose.

## (A) Portions and Provisions for younger Children made good in Equity.

1. A. Having Issue a Daughter by a former Venter, charged his Lands at *B.* for Payment of 3000 *l.* Portion to such Daughter, and afterwards married a second Wife, and made her a Jointure of a Moiety of these Lands at *B.* without taking Notice of this Charge of 3000 *l.* and afterwards by Will, thinking that this 3000 *l.* charged as aforesaid, would be good against the Jointure, and taking no Notice thereof, devised to his Wife other Lands in *Y.* in Lieu of her Jointure in *B.* and died; the Wife and Son and Heir agreed together, to defeat the Daughter of her 3000 *l.* Portion; and therefore the Wife, finding that the Settlement which was made on her Marriage, tho' subsequent in Time, would yet prevail against this Charge of 3000 *l.* which was voluntary and fraudulent as to her, adhered to her Jointure, and refused to accept of the Devise; but on a Bill brought by the Daughter, my Lord *Keeper* decreed, that she should hold such Part of the Lands in *Y.* as should be equal in Value to such of the Lands in *B.* as were comprised within the Jointure, until her Portion was raised. *Hill.* 1683. between *Reeve* and *Reeve*, 1 *Vern.* 219. 1 *Vent.* 363. *S. C. vid.* 2 *Vern.* 321.

*Vid.* Title *Devise*, Title *Legacy*; where Portions shall sink in the Inheritance for the Benefit of the Heir, Title *Heir.*

2. If a Man by Will gives 3000 *l.* to his Younger Children, which Sum is due from *J. S.* and secured by Mortgage; and adds, that for the more sure Payment of the said Sum, in case his Son and Heir, whom he appointed his Executor, should not pay the same according to his Will, then he devised his Lands to his younger Children, for the Raising and Payment thereof, *&c.* and dies; *J. S.*

prefers

prefers a Bill againſt the Heir, and younger Children, to redeem; and purſuant to a Decree for that Purpoſe, the 3000 *l.* is put out by a Maſter, upon a Security that proves ill; the eldeſt Son ſhall not be compelled to pay it over again to the younger Children. *Mich.* 1685. between *Oldfield* and *Oldfield*, 1 *Vern.* 336, 337; for it was not in the Power of the Heir to compel *J. S.* to keep the Money in his Hands.

3. But if the Lands of the Heir be charged with Portions for Infants, payable at Twenty-one, or Marriage, the Portions ſhall not be admitted to be paid in before they ſhall grow due, in Eaſe of the Land, nor ſhall the real Security be turned into a Perſonal one. 1 *Vern.* 338. *per Curiam.*

4. If by a Marriage Settlement Portions are provided for Daughters, the Father cannot by his Will annex any Condition to the Payment of them, or deviſe them over in caſe of the Death of any of the Daughters, before their Portions become payable. 1 *Vern.* 452. *per Curiam.*

5. Tenant in Tail, with Remainder in Fee to himſelf, levies a Fine, and ſettles his Eſtate on Truſtees, in the firſt place, to pay his Son and Heir 100 *l. per Ann.* and then to make Proviſion of 100 *l.* a-piece for his younger Children, to be raiſed and paid according to their Seniority, and a Maintenance in the mean Time. In this Caſe the Lord *Chancellor* decreed, 1*ſt*, That whereas at the Time of the Settlement, the Party that made it was a Widower, and had eight Children by his firſt Wife, and declared, that he intended not to marry again; yet in Regard he afterwards married a ſecond Wife, and had many Children by her, that the Children by the ſecond Wife were equally intitled with the Children of the firſt, to have the Benefit of this Proviſion for his younger Children. 2*dly*, That whereas the Deed directs the Proviſion for his younger Children ſhould be raiſed, and paid according to their Seniority, that yet in Caſe there ſhould happen a Deficiency, the eldeſt ſhould not have more, and the younger leſs, but they ſhould all be paid in Average. 1 *Vern.* 335.

6. If by Marriage Settlement 2500 *l.* is provided for the Iſſue of that Marriage, in ſuch Proportion as the Husband ſhall appoint, and he dies without making any Appointment, leaving a Daughter only, the Daughter ſhall have the 2500 *l.* Between *Davy* and *Hooper*, 2 *Vern.* 665.

## (B) At what Time Portions ſhall be raiſed, or Reverſionary Eſtates or Terms ſold for that Purpoſe.

1. *A.* Made a Settlement to the Uſe of himſelf for Life, Remainder to the Uſe of his firſt Son in Tail Male, Remainder to Truſtees for forty Years, Remainder to himſelf in Fee; the Term was declared to be a Truſt, that in Caſe it ſhould happen, that the ſaid *A.* ſhould die without Iſſue Male of his Body, then the Truſtees ſhould raiſe 5000 *l.* for Daughters Portions, payable at the Age of Twenty-one or Marriage, with a Proviſion for Maintenance in the mean Time; the Wife died, leaving two Daughters, and no Iſſue Male;

and it was reſolved, that the Right to the Portion was veſted by the Mother's Death, without Iſſue Male in the Life of the Father; for otherwiſe the Father might live ſo long, that the Portions might be of little Service. Between *Greaves* and *Mattiſon*, 2 *Jon.* 201.

2. So where a Settlement was made to the Husband for Life, Remainder to the Wife for Life, Remainder to the firſt and other Sons in Tail Male ſucceſſively, Remainder to Truſtees for 200 Years; and the Term was declared to be upon Truſt, that the Truſtees after the Death of the Husband and Wife ſhould out of the Rents and Profits raiſe and pay 4000 *l.* for younger Children at their Age of Twenty-one Years, unleſs the Perſon in Remainder ſhould raiſe and pay the ſame; and the Term was decreed to be ſold, and the Portions raiſed in the Life-time of the Father and Mother. *Mich.* 1 *W. & M.* between *Hellier* and *Jones*.

3. A Settlement on the Marriage of *A.* with *B.* was made on the Husband for Life, Remainder to the Wife for her Jointure, Remainder to the firſt and other Sons; and in Caſe of Failure of Iſſue Male of that Marriage, if there ſhould be Iſſue Female only one Daughter, then to Truſtees for 500 Years in Truſt to raiſe 500 *l.* for ſuch Daughter, to be paid at her Age of Twenty-one Years, or Day of Marriage, which ſhould firſt happen, next after the Death of the Father and Mother, or within ſix Months after either of thoſe Days or Times: And there being one Daughter only, and ſhe having attained Twenty-one, and her Father being dead, the Portion was decreed to be raiſed in the Life-time of the Mother. *Hill.* 1703. between *Gerrard* and *Gerrard*, 2 *Vern.* 458.

4. So where by a Marriage Settlement Lands were limited to the Husband and Wife for their Lives, Remainder to the Heirs Male of their Bodies; and if there ſhould be no Iſſue Male of their Bodies, and one or more Daughters, then to the Truſtees for 500 Years from the Deceaſe of the Survivor in Truſt, by Sale or Mortgage, to raiſe 1000 *l.* for Daughters Portions; but there was no Time appointed for the Payment of them; and the Father died leaving a Daughter only; the Portion veſting in the Daughter in the Life-time of the Mother, it was decreed to be raiſed by a Sale, with reaſonable Maintenance in the mean Time, tho' no Maintenance was provided by the Settlement. *Hill.* 1703. between *Srainforth* and *Stainforth*, 2 *Vern.* 460.

5. But where the Defendant, upon his Marriage, by Leaſe and Releaſe ſettled Part of his Eſtate to the Uſe of himſelf for Life, Remainder to Truſtees during his Life, to ſupport contingent Remainders, Remainder to Truſtees for 500 Years upon the Truſt after mentioned, Remainder to the Heirs Males of his Body on the Body of *M.* his then Wife to be begotten, Remainder to his own Right Heirs, and declares the Term of 500 Years to be upon Truſt; "That in Caſe he ſhould happen to die without Iſſue Male of his "Body on the Body of his ſaid Wife begotten, or that the Iſſue Male "begotten between them ſhould happen to die without Iſſue Male "of their Bodies, before they or ſome of them reſpectively attain "their ſeveral Ages of Twenty-one Years, and there ſhould be "Iſſue one or more Daughter or Daughters of his Body on her be-"gotten, either born in or after his Life-time, who ſhould be "unmarried, or not provided for as herein after is mentioned, at "the Time of his Deceaſe, then ſuch Daughter, if but one, to

" have 2000 *l.* for her Portion; and if two or more ſuch Daugh-
" ters, then they to have 2000 *l.* between them, to be paid and pay-
" able at their reſpective Ages of Eighteen Years, or Days of Marri-
" age, which ſhould firſt happen, or as ſoon as they could be raiſed;
" and in Caſe the ſaid Portion or Portions of the ſaid Daughter or
" Daughters ſhall not be paid according to the Purport and In-
" tent of theſe Preſents, then the Truſtees, or the Survivor of them,
" their Executors, *&c.* ſhall and may, out of the Rents, Iſſues
" and Profits, or by Mortgage or Sale of the ſaid Premiſſes, raiſe,
" make up and pay the ſaid Portion and Portions to the ſaid Daugh-
" ter and Daughters; and in the mean Time, and until the ſaid
" Portion and Portions ſhall reſpectively become payable as afore-
" ſaid, the ſaid Truſtees, their Executors, *&c.* ſhould out of the
" Rents, Iſſues, and Profits of the ſaid Premiſſes, raiſe and pay the
" yearly Sum of 30 *l.* a-piece, for the Maintenance and Education
" of ſuch Daughter or Daughters; provided, that if the Defendant
" in his Life-time, either before or after the Death of his Wife,
" pay or ſecure to be paid to the ſaid Daughter or Daughters
" (which ſhall be unmarried at the Time of his Death) the ſaid
" Portion or Portions, or if he ſhall have Iſſue Male, who ſhall
" live to Twenty-one Years of Age, then, and in ſuch Caſe, the
" ſaid Term of 500 Years to ceaſe and be void." Afterwards the Wife died without Iſſue Male, leaving only one Daughter the Plaintiff's Wife, who was upwards of twenty Years of Age; and the Defendant having married a ſecond Wife, and refuſing to give the Plaintiff one Penny Portion with his Wife, the Bill was brought to have a Decree for Sale of the Term in Remainder preſently, and the Portion with Intereſt paid from her attaining Eighteen Years of Age; but my Lord Chancellor having taken Time to conſider of it diſmiſſed the Bill: The Difficulty he ſaid, in this Caſe, was occaſioned by the Multiplicity of Words, and therefore to apprehend it the better, he had rejected the immaterial Words, and retained only thoſe that were material; then he took Notice, that the Term was a Term veſted and ſaleable; the only Queſtion was, whether it was to be ſold; and this depended on the Declaration of the Truſt; for if the Truſt had declared the Portion to be raiſed at Eighteen, or Marriage, ſhe ſhould not have ſtaid for her Portion, till the Death of her Father, but the Term in Remainder ſhould have been ſold preſently, and ſo has been the conſtant Practice of this Court; nay if the Term it ſelf had been limited on a Condition precedent, as if the Father ſhould die without Iſſue Male of his Body by ſuch a Wife, then to Truſtees for 200 Years, to raiſe Portions for Daughters at Eighteen or Marriage; tho' in this Caſe the Condition was precedent even to the Veſting of the Term; yet upon the Death of the Mother without Iſſue Male, the Precedents have gone, that the Term ſhould be ſold in the Life-time of the Father; and this Court hath warranted the Title, tho' the Term it ſelf was not veſted, which is a much ſtronger Caſe than this, where the Term is veſted preſently, and the Truſt is only conditional; tho' he ſaid, if this Caſe was *res integra*, he ſhould not have gone ſo far in either of thoſe Caſes, becauſe the plain and natural Meaning of the Deed cannot be to raiſe the Portions in the Life-time of the Father, when the Fund, out of which it is to be raiſed, is not to take Effect till after his Death; but thus far the

Court has gone, and the Reaſon that may be preſumed for it was, that in Equity they look'd on the Death of the Wife without Iſſue Male an equitable Performance of the Condition, tho' it was not ſo literally at Law, till the Father's Death; becauſe all that was contingent in the Condition by the Death of the Mother, without Iſſue, had happened; 'twas now impoſſible he ſhould die leaving Iſſue Male by her; for he was now become as it were Tenant after Poſſibility; and it was now no more than if it had been limited if he ſhould die, or when he ſhould die, the Remainder to Truſtees, *&c.* which is a Remainder veſted preſently, becauſe it depends upon that which muſt certainly happen; ſo if the Condition had been annexed to the Execution of the Truſt of the Term, yet upon the Death of the Mother without Iſſue Male, the Term ſhould have been ſold in the Life-time of the Father; for the ſame Reaſons as in the other; and the Reaſon of the Court's having gone ſo far, was to promote ſuitable Matches, and that Women might have their Portions when they were likely to do them moſt Service; for as this Court does ſometimes prolong the Time for Payment of Money, ſo it may ſometimes ſhorten and abridge it; and had this Caſe been like the others before mentioned, he ſhould have decreed it accordingly; but this materially varies from them; for in none of them are the Words following, *viz. unmarried, or unprovided for, as herein after mentioned, at the Time of his Deceaſe*; which Words are a Deſcription of, and ſuit only with the Perſon who is to have the Portion, *viz.* ſuch Daughter as is unmarried, or unprovided for, at the Death of the Father; and though in this Caſe ſhe is already married, yet ſhe may be provided for in the Father's Life-time; and ſo this Part of the Contingency, whether ſhe will be unprovided for at her Father's Death is ſtill to come; for ſhe who will claim the Portion by this Settlement, cannot ſay ſhe is unprovided for at his Death, which during his Life none can ſay; and this Conſtruction is the ſtronger from the Clauſe which appoints the Maintenance, for that is only out of the Rents and Profits; whereas the Portions are to be out of the Rents and Profits, or by Mortgage or Sale; and Rents and Profits in the firſt Clauſe, being put in Contradiction to Mortgage or Sale in the Second, muſt be reſtrained, and cannot warrant Mortgage or Sale; and the Maintenance appointed in the mean Time, that is from Failure of Iſſue Male, till payable, if the Portion ſhould be then due, the Maintenance would run on the Father's Eſtate for Life; which ſurely will not be pretended; but this is put beyond Diſpute by the Proviſo, if he ſhould pay, or ſecure to be paid, *&c.* And tho' the Words *or unprovided for* there are left out, this is but *vitium Clerici*, and muſt be inſerted to make it agree with the other Parts of the Deed; and then this Proviſo was to give him Liberty to determine the Term, which the Plaintiff would now have ſold, for Payment of the Portion in his Life-time, to any Daughter which ſhould be unmarried, or not provided for, at his Death; and as to the Caſes on this Head, he ſaid that in moſt of them, in which the Term was decreed to be ſold, there were no Conditions precedent, either to the Veſting of the Term or Execution of the Truſt; and decreed accordingly. *Trin.* 1710. between * *Corbet* and *Maidwell.*

* 1 *Salk* 159. *S. C.* 2 *Vern.* 640. *S. C.* 3 *Chan. Rep.* 190. *S. C.*

6. A Settlement was made on the Husband for Life, Remainder to the Wife for Life, and to the firſt and other Sons in Tail, and in Default

Default of ſuch Iſſue, to Truſtees for 500 Years in Truſt, after the Commencement of the Term, to raiſe 4000 *l.* as Portions for the Younger Children of the Husband and Wife, payable at Twenty-one or Marriage, by Rents, Profits, Sale or Mortgage; the Father died, leaving only a Daughter, who married the Plaintiff at Fifteen; and it was held, that the Portion ſhould not be raiſed in the Life of the Mother, nor that any Intereſt ſhould accrue for it during the Mother's Life, becauſe the Truſt is to raiſe the Portion, after the Commencement of the Term, which muſt be intended when it comes into Poſſeſſion. *Trin.* 1718. between *Butler* and *Duncomb*, 2 *Vern.* 760. *Quære* of this Caſe, for it ſeems to be ill reported.

7. A Settlement was made in the uſual Form, with a Limitation to Truſtees, for want of Iſſue Male, to raiſe Portions for Daughters, to be paid at Twenty-one or Marriage, which ſhould firſt happen, by and out of the Rents and Profits, or by Mortgage or Sale, as they ſhould think fit; and in the mean time, and till the ſaid Portions ſhould become payable, the Truſtees to raiſe 100 *l.* *per Ann.* for the Maintenance of each of them; the Father died, and one of the Daughters having married the Plaintiff, this Bill was brought to have the Portion raiſed, but was diſmiſſed, becauſe the Portion being to be raiſed out of the Rents and Profits, or by Mortgage or Sale, plainly ſhewed that it was not to be raiſed till ſuch Time as the Truſtees might make Uſe of the Election given them by the Settlement, to raiſe it either out of the Rents and Profits, or by Mortgage or Sale; but during the Life of the Mother, who had it in Jointure, they could not raiſe out of the Rents and Profits; therefore neither by Mortgage or Sale, which were all inſerted in one and the ſame Clauſe, and a diſcretionary Power lodged in the Truſtees, to uſe either the one Way or the other; and till they had the Election of uſing either of theſe Ways, they had no Power at all; beſides that, the Maintenance being to precede the Raiſing of the Portions, if there was no Maintenance to be raiſed in the Mother's Life-time, the Portions were not to be raiſed in her Life-time, as they were not to take Place till after the Maintenances; and my Lord *Chancellor* and the Maſter of the *Rolls* both ſaid, that the Caſes on this Head had gone too far already, and mangled all Eſtates, and that they would never decree Portions to be raiſed in the Father's Life-time, where it could poſſibly bear any other Conſtruction; and this Decree was affirmed in the Houſe of Lords. *Mich.* 1728. between *Brome* and *Berkley*.

## CAP. XLIV.

# CAP. XLIV.

## Power.

(A) Power, when well created, and when determined.
(B) Of the right Execution of a Power, and where a Defect therein will be ſupplied.

### (A) Power, When Well created, and When determined.

1. IF a Man gives Inſtructions to put his Will in Writing, and that his Meſſuages, *&c.* ſhould be ſold by *A.* and *B.* for the Payment of his Debts and Legacies, and dies; and after *A.* dies, *B.* and the Heir at Law will be compelled to ſell. *Hard.* 204.

2. So if Lands are deviſed to be ſold, and no Perſon is named for that Purpoſe, the Heir muſt do it. 1. *Chan. Ca.* 177. 1 *Chan. Rep.* 283. *S. P.*

3. If Truſtees are impowered to pay Portions at prefixt Days, out of the Rents and Profits of Lands, and the Rents and Profits will not amount to the Sums to be paid, they may ſell the Lands. 1 *Chan. Ca.* 175. 2 *Vern.* 1, 2. *S. P.*

4. If a Man has Power to charge Land with any Sum, not exceeding the Sum of 3000 *l.* he may charge it with 3000 *l.* and Intereſt beſides; for the Intention is to charge the Premiſſes with 3000 *l.* Principal Money, and that of Courſe carries Intereſt, and none would lend ſuch Sum on ſuch Security, if the Law were otherwiſe. *Paſch.* 12 *Ann.* between Lord *Kilmurry* and *Geery*, 2 *Salk.* 538. *in Canc.*

5. A Man makes a Settlement on the Marriage of his Son with one *B.* and (*inter al'*) there is this *Proviſo*, provided that if the ſaid *B.* ſhall happen to ſurvive her Husband, not having Iſſue, or without Iſſue of their Bodies, lawfully begotten between them, then *B.* to have Power to ſell and diſpoſe of ſuch Lands; the Husband dies leaving Iſſue; ſome Years after that Iſſue dies without Iſſue, and then the Wife ſells thoſe Lands; and it was held that her Power

took Effect, tho' the Husband did not die without Iſſue at the Time of his Death. *Paſch.* 1710. between *Holt* and *Bureigh*, 2 *Vern.* 653.

6. A Man makes a Settlement, wherein was a Power, that he might from Time to Time, by Deed or Writing under his Hand and Seal, revoke the Uſes thereof, and by the ſame, or any other Deed, limit and declare new Uſes: In purſuance of this Power, he revokes the old Uſes, and by the ſame Deed limits new Uſes, without annexing any new Power of Revocation to thoſe new Uſes; afterwards thinking he had, by Virtue of the firſt Settlement, a Power of Revocation *toties quoties*, he by another Deed revokes the laſt Uſes, and again declares other Uſes of the ſame Lands; and if he had ſuch Power was the Queſtion. It was agreed he might in the Deed of Revocation have annexed a Power of revoking the Uſes thereby declared, and might afterwards have executed that Power accordingly; but in this Caſe there being no ſuch new Power of Revocation annexed to the new Uſes, 'twas decreed that his Power of Revocation by the firſt Deed was executed, and at an End, and by Conſequence, that the Revocation afterwards was without any Warrant, and ſo the Uſes limited upon the firſt Revocation muſt ſtand; and this Decree was affirmed in the Houſe of Peers. *Trin.* 1717. between *Heli* and *Bond*.

## (B) Of the right Execution of a Power, and where a Defect therein ſhall be ſupplied.

1. IF one hath Power to make a Leaſe for ten Years, and he makes a Leaſe for twenty Years, yet in Equity this is good for ten Years of the twenty, and ſo has been ſettled ſeveral Times. *Trin.* 15 *Car.* 2. between *Pawcy* and *Bowen*, 1 *Chan. Ca.* 23.

2. One having a Power to make Leaſes for 21 Years in Poſſeſſion, made a Leaſe to *A.* for Twenty-one Years in Truſt for the Payment of Debts; but the Leaſe was made to commence from a Time to come, and ſo not purſuant to the Power, yet being made for the Payment of (*a*) *Debts* was ſupported in Equity. Between *Pollard* and *Green*, 1 *Chan. Ca.* 10. 1 *Chan. Rep.* 185. *S. C.*

(*a*) Tenant for Life, with Power to make Leaſes for Twenty-one Years, rendring the ancient Rent, makes a Leaſe for Twenty-one Years, to begin ſuch a Day after; this is not purſuant to the Power, and conſequently void, becauſe it is a future Leaſe which this Power does not warrant; for if he might make it in Reverſion, or *in Futuro*, tho' but a Month after, he may as well make it to begin Twenty Years after, or after his Death, and ſo defeat the Intent of the Power, which being to charge the Eſtate of a third Perſon, is to be taken ſtrictly; and to this Purpoſe are ſeveral Caſes, as *Palm.* 468-9. *Cro. Eliz.* 5. 6 *Co.* 33. 1 *Leon.* 35. 3 *Leon.* 130. 4 *Leon.* 64. *Moor* 199. *Pop.* 9. *Yelv.* 222. *Cro. Car.* 318. 2 *Roll. Abr.* 261. *Raym.* 247.

3. A Man made a voluntary Settlement on his Son for Life, and after to his firſt and other Sons in Tail, with Power for the Son to make a Leaſe in Poſſeſſion for Ninety-nine Years, determinable on three Lives, and alſo to make Leaſes for Sixty Years to commence after his Death, if he had Iſſue Male, to continue ſo long as he had Iſſue Male; the Son makes a Leaſe to his Father in Truſt for one of his younger Children; but the Leaſe was not purſuant to the Power; yet it was decreed good, and taken to be as a Leaſe made by the Father after a voluntary Settlement. *Mich.* 1698. Between *Gooding* and *Gooding*.

4. But where a Reverſioner upon an Eſtate for Life made a Settlement on herſelf for Life, with Power for her being Sole, to make Leaſes for three Lives in Poſſeſſion; and ſhe and her Husband, in the Life-time of the Tenant for Life, made a Leaſe for Twenty-one Years, *Habend.* from the Date; and it was held not purſuant to her Power; for by the Marriage ſhe put herſelf in the Power of her Husband; and my Lord *Keeper* took a Diverſity between a naked Power, and a Power which flows from an Intereſt; for where a bare Power is given to a Feme by Will to ſell Lands, altho' ſhe afterwards marries, ſhe may ſell the Lands, and may ſell to her Huſband; but where a Feme, upon a Settlement of her own Eſtate, reſerves a Power which flows from an Intereſt, that Power ought to be executed by the Feme whilſt Sole; and yet he ſaid, ſuch Power ought to be taken liberally, tho' formerly they were taken ſtrictly. *Hill.* 15 *Car.* 2. between the Marquiſs of *Antrim* and the Duke of *Buckingham*, 1 *Chan. Ca.* 17.

5. *A.* on the Marriage of his Eldeſt Son *B.* makes a Settlement of certain Lands on *B.* for Life, Remainder to his firſt, ſecond and third, *&c.* Sons in Tail, Remainder to *C.* a ſecond Son for Life, and to his firſt, *&c.* Remainder to himſelf in Fee, with a Power to *B.* and *C.* ſeverally as they ſhall come into Poſſeſſion, to make Leaſes for three Lives, or Twenty-one Years, or any Number of Years determinable in three Lives, in this Manner. Firſt, *Of all or any of the Lands anciently and accuſtomably demiſed, whereof Fines have been uſually taken, reſerving the ancient, uſual and accuſtomable Rents or more.* Secondly, *Of all the other Lands, reſerving the moſt improved Rents that can be got*; and that the Tenants ſhould ſeal and execute Counterparts of their Leaſes; *B.* died without Iſſue, *C.* entred, and being ſeiſed with a ſudden Sickneſs, when he had no Rent-Rolls, or old Leaſes to guide him, taking Notice of his Power generally, executes two Leaſes; one of the Lands not anciently or accuſtomably letten, and thereon reſerved the *beſt improved Rent*; and on the other reſerved the ſeveral *ancient and accuſtomable Rents*, but does not ſpecify what thoſe Rents are, and died; and it was held clearly by my Lord *Cowper*, *Holt* and *Trevor*, Ch. Juſtices, that the firſt Leaſe was void, and not warranted by the Power; nothing being ſo uncertain as what ſhall be ſaid the moſt improved Rent; and my Lord *Cowper* and *Trevor* againſt *Holt* held, that the ſecond Leaſe was void alſo for Uncertainty, and the Inconveniency he in Remainder or Reverſion would be put to, in not being able to avow for the Rent with Exactneſs; by which Means he may be nonſuited, and ſo prevented of having any Benefit of the Lands; and tho' a Court of Equity may decree ſuch a Leaſe good between the Leſſor and Leſſee; yet as there appears no Conſideration in this Caſe, it is not proper that the Court ſhould interpoſe in ſupplying a Defect, and thereby lay a Charge on the Right of a third Perſon. *Hill.* 1705. between *Orby* and Lady *Mohun*, 2 *Vern.* 531, 543.

6. *J. S.* having four Children, *viz.* two Sons, and two Daughters, ſettles his Eſtate on Truſtees, to the Uſe of himſelf for Life, Remainder to his Wife for Life, and after their Deceaſe, to the Uſe and Uſes of ſuch Child and Children, and in ſuch Shares and Proportions, as he ſhould appoint by any Writing by him to be ſigned in the Preſence of two Witneſſes; and in Default of ſuch Appointment, to his eldeſt Son in Tail; he by his Will by him ſigned, and atteſted

atteſted by ſeveral Witneſſes, deviſes a Rent-Charge out of thoſe Lands to his youngeſt Son, and to the firſt and other Sons of his Body ſucceſſively in Tail; and further Wills, that in Caſe his ſaid Son die without Iſſue Male, ſo as the Eſtate ſhould come to his eldeſt Son, then he to pay 500 *l.* a-piece to his Daughters; the Son dies without Iſſue; and the Bill was brought by the Daughters to have the 500 *l.* a-piece, according to the Will; the eldeſt Son by way of Plea ſet forth the Deed of Settlement, and Power *prout*, and inſiſted, that the Power was not well purſued or executed by the Will; (to wit) that the Teſtator might have diſtributed the Land amongſt his Children in ſuch Proportions as he thought fit, but had not Power to grant or deviſe a Rent-Charge, or Sums of Money, as he had taken upon him by his Will to do; but the Court diſallowed the Plea, and ordered him to anſwer the Bill. *Trin.* 1788. between *Thwaytes* and *Dye*, 2 *Vern.* 80.

7. If *A.* on his Marriage, conveys Lands to a Truſtee, to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of their Bodies, Remainder to *A.* in Fee; *Proviſo* that in Default of Iſſue of the Marriage, the Truſtee ſhall convey to ſuch Uſes as the Survivor of the Husband or Wife ſhall appoint; altho' the Husband deviſes the Land, and dies firſt without Iſſue, yet the Wife has a good Power of diſpoſing of the Eſtate by her Appointment. *Trin.* 1700. between *Spearing* and *Lynn*, 2 *Vern.* 376.

8. *A.* by a Marriage Settlement is Tenant for Life, Remainder to Truſtees to raiſe 4000 *l.* for younger Childrens Portions, as *A.* ſhould appoint, Remainder to his firſt, *&c.* Sons in Tail. *A.* having ſeveral Children appoints the 4000 *l.* amongſt his younger Children, and particularly 2600 *l.* thereof on *B.* his ſecond Son, who was then under a Treaty of Marriage; the eldeſt Son died ſix Years afterwards, whereby *B.* became eldeſt Son, and intitled to the whole Eſtate after his Father's Death; and thereupon *A.* made a new Appointment of the 2600 *l.* amongſt his other younger Children; and it was held, that tho' *B.* was a Perſon at the Time, capable of taking within the Power of appointing, yet it was upon a tacit or implied Condition, that he ſhould not afterwards happen to become the eldeſt Son, and that this was a *defeazable* Appointment, not from any Power of revoking, or upon the Words of the Appointment, but from the Capacity of the Perſon; and decreed accordingly. *Hill.* 1705. between *Chadwick* and *Doleman*, 2 *Vern.* 521.

9. On a Marriage-Settlement 2500 *l.* was provided for the Iſſue of the Marriage, in ſuch Proportion as the Husband ſhould appoint; he died leaving only a Daughter, and made no Appointment, and the 2500 *l.* was decreed her. *Mich.* 1710. between *Davy* and *Hooper*, 2 *Vern.* 665.

10. If a Man gives Legacies to his Children to be paid at Twenty-one, or Marriage, and if any of them dies before Twenty-one or Marriage, the Legacy of ſuch Child to be diſpoſed to *one* or more of the Children then living, in ſuch Manner as his Wife, whom he made Executrix, ſhould think fit; and one of the Children dies under Age and Unmarried; the Mother may appoint ſuch Legacy to any *one* of the other Children, and it will be good. *Mich.* 1705. between *Thomas* and *Thomas*, 2 *Vern.* 513.

11. But if an Executor has a general Power to diſtribute a Sum of Money amongſt Children at Diſcretion, and he makes an unrea-

ſonable or indiſcreet Diſpoſition, it will be controlled in a Court of Equity. 2 *Vern.* 513. *per Curiam.*

12. So where a Man having two Daughters, one by a former Wife, and another by a ſecond Wife, deviſed his Eſtate to his Wife, to be diſtributed between his Daughters, as his Wife ſhould think fit; and ſhe having given 1000 *l.* to her own Daughter, and but 100 *l.* to the other, the Court decreed an equal Diſtribution. Between *Cragrave* and *Perroſt*, 1 *Vern.* 355.

13. *A.* deviſed his Perſonal Eſtate, and 400 *l.* to be raiſed out of a Truſt Eſtate, to be diſtributed by two of his Daughters, his Executrixes, amongſt themſelves and their Brothers and Siſters, according to their Need and Neceſſity, as they in their Diſcretion ſhould think fit; and my Lord *Keeper* decreed the Heir at Law a double Share thereof, as looking upon him as ſtanding moſt in Need thereof; which Decree was affirmed in the Houſe of Lords. *Paſch.* 1701. between *Warburton* and *Warburton*, 1 *Vern.* 421.

14. If a Man makes a Settlement of his Eſtate on his eldeſt Son in Tail, with a Power by Deed or Will, under Seal, to charge the Lands with any Sum not exceeding 500 *l.* and he prepares a Deed, and gets it ingroſſed, by which he appoints the 500 *l.* to his younger Children, and dies before it is ſigned or ſealed; yet this ſhall amount to a good Execution of his Power in Equity, the Subſtance being performed. *Mich.* 27 *Car.* 2. between *Smith* and *Aſhton*, 1 *Chan. Ca.* 264.

15. *A.* by Settlement intailed his Eſtate, with Power of Revocation by any Writing publiſhed under his Hand and Seal, in the Preſence of three Witneſſes; the Land deſcended to his Son, who mortgaged it to *J. S.* who brought his Bill to foreclоſe; and it appearing that *A.* had by his Will, wherein he recited his Power, declared that he revoked the Settlement, tho' but two Witneſſes who ſigned, but another preſent; yet my Lord Chancellor decreed, that the Morgage-money ſhould be paid, and ſaid, that in Strictneſs here was a good Execution of the Power, a third Witneſs being preſent, tho' he did not ſign his Name; and if there had not, yet it was proper that ſuch a little Circumſtance ſhould be helped in Equity. *Hill.* 32 *Car.* 2. between *Sayle* and *Freeland*, 2 *Vent.* 350.

16. Tenant in Tail with Power to make a Jointure of Lands in the Counties of *A. B.* and *C.* Remainder in Tail to *J. S.* marries and receives 3000 *l.* Portion with his Wife, and by Articles before his Marriage covenants to ſettle a Jointure, but dies before any Settlement was made; the Wife dies, and her Executrix brings a Bill to have an Account of the Profits of the Lands, which by the Articles were covenanted to be ſettled in Jointure againſt the Remainderman, who had upon his Marriage ſettled thoſe Lands upon his Wife and her Iſſue, but with Notice of the Power in the firſt Tenant in Tail to make a Jointure; and my Lord *Chancellor* diſmiſſed the Bill, there being no Equity for the Executrix of the firſt Jointreſs againſt the Second and her Iſſue, who was equally a Purchaſer with the firſt. *Mich.* 1686. between *Elliot* and *Hele*, 1 *Vern.* 406. 2 *Chan. Ca.* 29, 30, 87. *S. C.* but no Reſolution.

17. But where *A.* Tenant for Life, with Power to make a Jointure of 1000 *l. per Annum*, upon his Marriage covenanted to make a Jointure on his Wife of 1000 *l. per Annum*, and purſuant thereunto a Settlement was made, and a Particular of Lands, which were men-

tioned to be worth 1000 *l. per Ann.* was ſet out for the Jointure, but in Truth fell ſhort, and were not above 600 *l. per Annum*; and on the Jointreſs's Bill, the Court decreed the Jointure to be made up 1000 *l.* againſt the Iſſue in Tail, though it was urged, that he was not privy to the Marriage-Treaty, nor guilty of any Fraud. *Trin.* 1700. between the Lady *Clifford* and Lord *Clifford*, 2 *Vern.* 379.

18. Sir *Edward Gold*, the Plaintiff, and his Lady, intermarried in 1683, and ſome Years after the Marriage an Eſtate of Inheritance of about 100 *l. per Ann.* deſcended to the Lady; whereupon ſhe and her Husband, by Indenture, aſſigned and conveyed this Eſtate to Truſtees and their Heirs, in Truſt, to permit the Lady from Time to Time, notwithſtanding her Coverture, without her Husband, and not to be ſubject to his Power or Controul, to apply and diſpoſe of the Rents, Iſſues and Profits thereof, as ſhe ſhould by any Writing under her Hand and Seal, in the Preſence of Two or more Witneſſes, direct and appoint, with a Power likewiſe for the Truſtees to make ſuch Sales, Mortgages, or other Conveyances of the Lands themſelves, as the Lady ſhould in like Manner direct and appoint: The Lady, by Parcimony and Frugality had, in about twenty-two Years Time, ſaved about 1400 *l.* out of this her ſeparate Eſtate, 790 *l.* whereof ſhe had inveſted in *Eaſt-India* Bonds, 200 *l.* in twenty Lottery-Tickets, and had the Reſidue in Ready Money and Broad Pieces; the Defendants were her Nieces, for whom (having no Children) ſhe had a very great Regard and Love; and having given them, with her Husband's Privity, four of the Bonds, ſhe lodges the other Three in the Truſtees Hands, taking their Note for the Delivery of them, and afterwards directs the Truſtees to deliver the other Three to whomſoever ſhould bring their Note, and then gives the Note to one of the Defendants, who thereupon, by her Orders, goes to the Truſtees, and gets up the three Bonds from them; and thoſe Bonds the Lady told her Nieces, ſhe intended ſhould be theirs after her Death, but that ſhe expected to have the Intereſt ariſing thereby during her Life; ſhe afterwards, ſome ſhort Time before her Death, delivers likewiſe to one of her Neices a Caniſter, wherein were 400 *Guineas*, and ſeveral Broad Pieces of Gold, telling her, ſhe intended that to be divided between her and her Siſter, after her Death; and likewiſe directed the Truſtees to divide the twenty Lottery-Tickets between her Nieces, after her Death. All this Tranſaction was only by Word of Mouth, without any Writing whatſoever, but was fully proved in the Cauſe. In 1712, the Lady *Gold* died, and Sir *Edward*, her Husband, having taken out Adminiſtration to his Lady, brought his Bill againſt the Defendants, to have an Account and Delivery up of the *Eaſt India* Bonds, and of the Money ſo delivered to them, and likewiſe againſt the Truſtees for the twenty Lottery-Tickets, and the Nieces brought a Croſs-bill to eſtabliſh their Title to the Money and Bonds, and to have the twenty Lottery-Tickets delivered to them, according to the Direction of my Lady *Gold*. It was urged for Sir *Edward*, that this Power to his Lady to diſpoſe of the Profits of her Eſtate, was not before Marriage; that ſhe was not a Purchaſer of it, but that being after Marriage, and voluntary, it ought to be conſtrued ſtrictly; that theſe Powers being in Derogation of the Rights of Husbands, were not allowed at Law; and tho' Courts of Equity had ſupported them, yet that was only where the Power was ſtrictly

and literally purſued; that the Defendants were neither Children nor Grandchildren, and but remotely allied to the Lady; that though defective Executions of Powers had been ſometimes ſupplied in this Court, for the Sake of a Wife or Children, or for the Sake of Creditors, yet it was never yet carried ſo far as to aſſiſt Strangers; and that it was to be reſembled to the Caſes of Copyhold Lands, where the Want of a Surrender had never yet been ſupplied, but in the three Inſtances before-mentioned, or for Charitable Uſes; that Circumſtances were frequently impoſed on the Parties themſelves to prevent Surprize; and that if theſe Circumſtances were not purſued, a Court of Equity would not aſſiſt, eſpecially any Perſon who claims by a voluntary Diſpoſition; and ſo was the Duke of *Albemarle*'s Caſe, where the Revocation was to be in the Preſence of ſix Witneſſes, whereof three were to be Peers; yet that Circumſtance could not be aided; that for ſmall trifling Sums they agreed it was not neceſſary the Lady ſhould make a Writing under her Hand and Seal atteſted, according to her Power, but for ſuch conſiderable Sums as theſe were the Power muſt be purſued, or elſe the Diſpoſition would be void; that in this Caſe, if the Lady had made a Will in Writing, unleſs atteſted by two Witneſſes, it would not have been good, much leſs this Parol Diſpoſition, and conſequently the Husband intitled to them as Adminiſtrator to his Wife. On the other Side it was inſiſted, that it was a ſtrange Doctrine to advance, that the Wife in this Caſe muſt be bound ſtrictly to purſue the Power, when ſhe had the Money in her own Hands; that the Intent of that Power was only in Caſe ſhe had diſpoſed of it to any other Perſon, whilſt it remained in the Truſtees Hands, before ever ſhe had received it; that it could not be pretended, but that the Truſtees might pay it to her ſelf, without any ſuch Writing; that they had ſo done in this Caſe, and that ſhe was then at Liberty to have ſpent it, or to give it away, as ſhe thought fit; that it was hard to ſay, ſhe had a Power over it whilſt in the Truſtees Hands, and yet that, as ſoon as ſhe received it herſelf, and conſequently as ſoon as it became uſeful to her, that then it ſhould be the Husband's, unleſs ſhe purſued her Power; that if ſhe had taken up Clothes or Goods of any Tradeſman, ſurely it would not be pretended, but that ſhe having the Money in her own Pocket, might pay them without any ſuch Writing under her Hand and Seal; that therefore the Caſes cited were not to the Purpoſe; for here the Money being in her own Hands, ſhe was at Liberty to give or diſpoſe of it as ſhe thought fit; that the Direction to the Truſtees to deliver theſe Tickets to her Neices, after her Death, was a Kind of *Donatio cauſa Mortis*; and that as ſhe, being in Poſſeſſion of them herſelf, might have given them to her Nieces; ſo ſhe might direct her Truſtees afterwards, when they had them by her Delivery. My Lord *Chancellor* ſaid, there was no Difference in theſe Caſes, whether the Power were given before Marriage, or after; for if the Diſpoſition is to take Place in Virtue of this Power, it muſt be ſtrictly purſued in either Caſe; that he thought it ſhould rather be taken more liberally, when given after, than when before Marriage; for then the Husband could be ſuppoſed to be under no Temptation of giving it, as he might before Marriage, in Hopes of prevailing on his Wife after, to give it up, or relinquiſh it; that therefore it muſt be intended he fully deſigned ſhe ſhould have the Benefit of it; that the Reaſon why the Will of a Feme Covert was not good, was not for Want of Power

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in the Wife; for if the Husband conſented, the ſame Inſtrument which ſhe executed as her Will would be ſufficient to paſs it, and it would go out of her Property; that ſhe having in this Caſe received the Money, had abſolute Power to diſpoſe of it as ſhe thought fit; that ſhe might have given it away abſolutely, or upon Terms; that if, as it was agreed, ſhe might diſpoſe of little Sums, why not of great ones? where was the Difference, where muſt the Bounds be ſet? that by this Power ſhe was made in the Nature of a Feme Sole; and as ſuch a Diſpoſition in that Caſe would have been good, why not in this? her Adminiſtrator in that Caſe could not have impeached ſuch a Diſpoſition; no more can her Husband in this, who has no other Right but as Adminiſtrator; that the Diſpoſition by her was perfect and compleat; that the Reſerving the Intereſt to herſelf during Life, bound indeed the Party, but did not defeat the Gift; that it was in her Power to give it on what Terms ſhe pleaſed, and either preſently, or at a future Time, and that her Death made no Difference in the Caſe; and as ſhe might have paid any Tradeſman's Bill without ſuch Writing, ſo ſhe might diſpoſe of the Whole, or of Part, in the ſame Manner; and ſo decreed the Whole 1400*l.* to be well diſpoſed of to the Nieces, in Regard the Money being paid to her, was abſolutely in her own Diſpoſal. *Paſch.* 1719. between *Gold* and *Rutland.*

19. *A.* deviſed his Lands to *B.* his eldeſt Son, for Life, Remainder to his firſt and other Sons in Tail Male, Remainder to his ſecond and third Sons in like Manner, with Power to every Perſon who ſhould, by Virtue of the Will, be ſeiſed of the Lands by any Writing indented under his Hand and Seal, to ſettle a Jointure on his Wife of 500*l. per Annum*; provided ſuch Wife ſhall have a Fortune equivalent to ſuch Jointure, and died; *B.* entred, and on Treaty of Marriage with the Plaintiff, covenanted in Conſideration of 10000*l.* Marriage-Portion, that he or his Heirs would, after the Marriage, at his own Coſts and Charges, according to the Power given him by his Father's Will, or *otherwiſe*, by good Conveyances, ſettle Lands of 500*l. per Annum*, upon the Plaintiff, for her Jointure, to commence in Poſſeſſion immediately after his Death, if ſhe ſurvived him; the Marriage took Effect; afterwards *B.* got a Settlement made and ingroſſed purſuant to his Power and the Marriage Covenant, but by various Accidents was prevented from Signing the Deed; and being taken ill died ſuddenly, not having the Deed by him, and having expreſſed (as was fully proved) great Uneaſineſs at its not being perfected, and left the Plaintiff by his Will (which he had made ſome Time before) a Legacy of 3000 *l. beſides what is ſettled on her by the Marriage-Articles*; and it was decreed by my Lord *Chancellor*, aſſiſted with the Maſter of the *Rolls* and Mr. Baron *Price* and Mr. Baron *Gilbert*, that this defective Execution ſhould be ſupplied in Equity, ſo as to bind the Eſtate in the Hands of the Remainder-man; altho' it was objected, that ſhe had a Remedy by the Covenant againſt the Heir and Executor of the Husband; and that, by the Words in the Covenant the was at Liberty to make a different Proviſion for her. *Paſch.* 1724. the Earl of *Coventry*'s Caſe.

# CAP. XLV.

# Privilege.

(A) What Persons are intitled to Privilege.
(B) Of Proceedings by, or against a privileged Person.

## (A) What Persons are intitled to Privilege.

1. A Member of the Convocation is to be allowed the same (a) Privilege with a Member of Parliament. 3 *Chan. Rep.* 38.

(a) This is expresly enacted by the Stat. 1 *H.* 6. *cap.* 1.

2. The Widows of Peers ought to have no Privilege, because they are not to be called to Counsel; but they are to have Privilege of Peers, not to be arrested; declared by my Lord Chancellor *Finch* to have been so resolved in Parliament. 19 *Dec.* 1676. 2 *Chan. Ca.* 224.

3. Two of the Defendants, being the Officers of the *Exchequer*, plead the Privilege of the *Exchequer*; but the Plea was over-ruled; because there was a third Defendant, who had no Right of Privilege. 1 *Vern.* 246.

## (B) Of Proceedings by, or against a privileged Person.

1. IF a Member of Parliament sues at Law, and a Bill is exhibited in Chancery to be relieved against that Action, the Court will make an Order to stay Proceedings at Law till Answer, or further Order, although the Court will not proceed against a Member who has Privilege of Parliament. 1 *Vern.* 322.

2. The Court granted an Injunction against a Member of Parliament, but at the same Time ordered that no Attachment should be taken out. 3. *Chan. Rep.* 21.

3. The Plaintiff having brought a Bill to redeem an old Mortgage against the Defendant, who was then an *Ambassador* at the Court of *Spain*; the Defendant obtained an Order, that all Proceedings should cease until his Return from his *Embassy*; the Plaintiff moved to discharge the Order; and upon Debate it was agreed a *Protection* lies for an *Ambassador*, *quia Profecturus*, or *quia Moraturus*, and n ay

at Law caſt an Eſſoign for a Year and a Day, and may afterwards renew it, if the Occaſion continues; and in this Caſe the Court ordered a Stay of Proceedings for a Year and a Day from this Time, unleſs the Defendant ſhould ſooner return into *England*. 2 *Vern.* 317.

4. The Plaintiff, being protected by the *Genoeſe* Ambaſſador, was ordered, though after an Anſwer put in, to give Security to anſwer the Coſts in the ſame Manner as if he were a Foreigner; becauſe by the 7th of *Ann.* all Proceſs againſt Ambaſſadors, and their Servants, are made void; ſo that if the Bill ſhould be diſmiſſed, no Proceſs could Iſſue againſt him; and a Precedent was produced the 25th of *July*, 1709. between *Barret* and *Buck*, where the like Order was made by my Lord *Cowper*; and that Caſe was likewiſe after Anſwer was put in. *Paſch.* 1729. between *Goodwin* and *Archer*.

# CAP. XLVI.

## Proceſs.

(A) Of iſſuing, ſerving, and returning a Proceſs, by, and againſt whom, at what Time; and here of Contempts.

(B) Of Sequeſtrations.

Of Injunctions, *vide* Title *Injunction*.

### (A) Of iſſuing, ſerving, and returning a Proceſs, by, and againſt whom, at what Time; and here of Contempts.

1. IF a Cauſe has ſlept twelve Months in Court, there ſhall be no Proceedings had upon it, without firſt ſerving a *Subpœna ad faciendum Attornat'*. 1 Vern. 172.

2. If a Man is arreſted upon an Attachment, the Contempt ſhall hold good, tho' no Affidavit be filed at the Time of taking forth the Attachment, if it be filed before the Return of it. 1 *Vern.* 172.

3. If one be taken up on an Attachment, either in Proceſs or in Execution after a Decree, yet in both Caſes, on his appearing before the Regiſter, he is to be diſcharged, and to anſwer the Interrogatories at large, not in Cuſtody; and if he be continued in Cuſtody, the Court on Motion, and appearing before the Regiſter, will diſcharge him. *Hill.* 1700. between *Danby* and *Lawſon.*

4. So if the Sheriff take one up on Attachment in Proceſs, he is to give a Bond of 40 *l.* Penalty to the Sheriff, to appear and anſwer; but for one taken up in Execution after a Decree, the Sheriff may inſiſt on Security proportionable to his Duty; but in both Caſes, on the Regiſter's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond; agreed to by the Regiſters, and ruled by the Maſter of the *Rolls*, *Hill.* 1700. between *Danby* and *Lawſon.*

5. The Plaintiff obtained an Order, that Service of Proceſs to appear at the Defendant's laſt Place of Abode, ſhould be deemed good Service, and left the ſame at the Houſe where he lodged, and carried on the Proceſs to a Sequeſtration, and then brought on the Cauſe againſt the other Defendant, who inſiſted that if the Plaintiff ought to be relieved againſt him, he ought to have a Decree over, againſt the other Defendant; and therefore he was concerned to ſee that the Proceeding was regular, and inſiſted, that it being above twelve Months ſince the other Defendant had left that Lodging, the Service was not good; and of that Opinion was the Court. 2 *Vern.* 369.

6. If after Proceſs of Contempt, the Defendant put in an inſufficient Anſwer, and ſo reported, the Plaintiff ſhall not, as formerly, begin the Proceſs at the *Subpœna*, but ſhall go on to the Attachment with Proclamation, and other Proceſs, as if the Anſwer had not been put in. 1 *Chan. Ca.* 238.

7. A Diſtinction was taken by the *Solicitor General*, and agreed to by the Court as reaſonable and agreeable to the Meaning of the printed Orders of the Court, that if Proceſs to a Meſſenger, or any other Proceſs of Contempt, has gone out againſt a Defendant for Want of his Anſwer, that on Tender of the Coſts of thoſe Contempts, if the Plaintiff accepts them, and the Anſwer, on looking into it, appears to be inſufficient, ſo that the Plaintiff takes Exceptions, and the Defendant is obliged to put in a further Anſwer; that in order to compel the Defendant to put in ſuch further Anſwer, if not put in in Time, the Plaintiff muſt begin all Proceſs *de novo*, and go on with it regularly, becauſe his Acceptance of the Coſts was a Remiſſion of all former Contempts, and purged them; but as an inſufficient Anſwer is really no Anſwer at all in the Judgment of the Court, if he refuſes to accept the Coſts, and the Anſwer being put in on Exceptions taken to it, it is reported inſufficient, he may go on with the Proceſs where he left off, to compel putting in a further Anſwer, without beginning *de novo*, as in the other Caſe. *Trin.* 1728. between *Haiſtwell* and *Grainger.*

8. Proceſs iſſued againſt the Defendant till Proclamation returned, then came a general Pardon; and the Defendant appeared and demurred to the Bill, which the Plaintiff moved to ſet aſide, becauſe though the Contempt was pardoned, yet the Delay was a Loſs to him; but the Court ordered them to proceed on the Demurrer; for by the Pardon the Defendant ſtands *rectus in Curia.* 1 *Chan. Ca.*

9. Upon a Motion for a *Serjeant* at *Arms*, on a Commiſſion of Rebellion returned, it was held that by the King's Demiſe every Proceſs

Proceſs of Contempt not Executed is determined, ſo that the Party muſt begin again at an Attachment; but where any Proceſs is executed, and a *Cepi Corpus* returned, there the Proceſs ſtands good. 1 *Vern.* 300.

10. But when an Attachment was ſued out in the Time of King *Charles* the Second, and executed three Days after his Demiſe, but before Notice of his Death; and it was adjudged to be well executed, and the Proceedings thereon regular. 1 *Vern.* 400. *Q.*

## (B) Of Sequeſtrations.

1. IF a Defendant is in Contempt, and in Priſon for not Performing a Decree, the Court will order a Sequeſtration againſt his Real and Perſonal Eſtate. 2 *Chan. Rep.* 151. Of the Antiquity of Sequeſtrations, and that they are proper and neceſſary Proceſſes, *vid.* 1 *Chan. Ch.* 92. 1 *Vern.* 421.

2. Upon an Affidavit that the Defendant was gone into *Holland* to avoid the Plaintiff's Demand againſt him; and he having been arreſted on an Attachment, and a *Cepi Corpus* returned by the Sheriff, the Court, upon Motion, granted a Serjeant at Arms againſt him; and upon the Return thereof granted a Sequeſtration. 1 *Vern.* 344.

3. A Sequeſtration, that iſſues as a Meſne Proceſs of the Court, will be diſcontinued and determined by the Death of the Party; but where a Sequeſtration Iſſues in Purſuance of a Decree; and to compel the Execution of it there, tho' the ſame be for a perſonal Duty, it ſhall not be determined by the Death of the Party. 1 *Vern.* 58. *Q.* 1 *Vern.* 118, 166.

4. A Sequeſtration binds from the very Time of Awarding the Commiſſion, and not only from the Time of Executing of it, and its being laid on by the Commiſſioners; for if that ſhould be admitted, then the inferior Officer would have *Ligandi & non Ligandi Poteſtatem.* 1 Vern. 58.

5. The Party who takes out a Sequeſtration, ſhall not be anſwerable for the Acts of the Sequeſtrators, for they are the Officers of the Court; as if they have Power to fell Timber, and they fell to the Value of 7000 l. and bring only 2000 *l.* into the Account. 1 *Vern.* 160, 161.

6. Sequeſtrators on a meſne Proceſs are accountable for all the Profits, and can retain only ſo far as to ſatisfy for the Contempts. 1 *Vern.* 248.

# CAP. XLVII.

# Purchaſe and Purchaſer.

(A) Who is deemed a Purchaſer in Equity.
(B) Purchaſers, in what Caſes Favoured in Equity.
(C) Where a Purchaſer, who purchaſes from one who has only a Power to ſell, muſt ſee that the Purchaſe Money is rightly applied.

Of Purchaſers without Notice, and of preſumptive Notice, *vid.* Title *Notice*.

## (A) Who is deemed a Purchaſer in Equity.

1. LEſſee at a *Rack* Rent, tho' he paid no Fine, is a (*a*) Purchaſer, and ſhall avoid a voluntary Conveyance. 2 *Vern.* 327.

(*a*) Tho' the Word *Purchaſe*, in Law, is of a very extenſive Signification, and comprehends every Species of Acquiſition in Contradiction to hereditary Deſcent and Eſcheat. *Lit. Sect.* 12. Yet in Equity a Purchaſer is conſidered as a Perſon, who innocently, without Fraud or Surprize, for valuable Conſideration, acquires a Right or Intereſt, and is therefore ſo far favoured and protected, that his Title ſhall not be impeached in Equity; no Planks that he can lay hold on, and by which he can ſecure himſelf at Law, ſhall be taken from him, neither ſhall he be compelled to diſcover any Thing that will weaken his Title, &c. *vid.* Title *Notice* and *Bills of Diſcovery*, Title *Bill*, and 1 *Chan. Ca.* 36. 2 *Chan. Ca.* 48, 161, 252. 1 *Vern.* 27. 2 *Vent.* 339. 2 *Vern.* 158, 159.

2. *A.* entred into Partnerſhip in Fifths, and three others, for twenty-one Years, in digging for Mines in *A.*'s Lands, *A.* to have two Fifths, and in Conſideration of his Ownerſhip of the Land, to have a Tenth out of the Share of the other Partners, and they covenanted to bear Profits and Loſs in Proportion; provided, if any one of the Partners ſhould be minded to deſiſt, and ſignify ſuch his Intention, and pay his Share of the Charges and Expences to that Time, the Agreement as to him, on his Releaſing his Intereſt to the Reſt, to be void; purſuant to the Articles they ſearched for Mines, and after two Years Time, and the Expence of about 120 *l.* they diſcovered a valuable Mine, and worked for about the Space of three Months, and then *A.* died, and his Widow ſet up a voluntary Settle-

ment made after Marriage; and the Court inclined, that the Partners were as Purchaſers, and that the voluntary Settlement ſhould not ſtand againſt them. *Mich.* 1695. between *Shaw* and Lady *Standiſh*, 2 *Vern.* 326.

3. If a Man, in Conſideration of a Marriage-Portion, ſettles a Jointure on his Wife, and makes a Proviſion for the Iſſue of that Marriage, the Wife and Children are to be conſidered as Purchaſers for valuable Conſideration; and though the Settlement was made after Marriage, yet if it was made purſuant to Articles entred into for that Purpoſe previous to the Marriage, it is the ſame Thing; and the Jointreſs, in ſuch Caſe, ſhall avoid a prior voluntary Conveyance, and ſhall not be obliged to diſcover Writings, nor any Thing elſe that may Prejudice her, unleſs ſhe has her Jointure confirmed to her. 1 *Chan. Ca.* 99. 1 *Vern.* 440, 479. 2 *Vern.* 701.

4. But if the Settlement was made after Marriage, and not purſuant to Marriage-Articles, it will be fraudulent againſt Creditors, but it will be good againſt a ſubſequent Purchaſer with Notice, tho' not againſt one without; for the Wife and Children are to be conſidered more than mere Voluntiers; but if the Matter reſts barely in Covenant or Agreement, it will never be carried into Execution againſt a ſubſequent Purchaſer without Notice, who has got a legal Title, nor againſt a ſecond Jointreſs without Notice, who brought in a Marriage-Portion. *Vid.* Title *Dower* and *Jointure*, Letter (C). 1 *Vern.* 17, 217, 286.

5. If a Wife joins with her Husband in letting in an Incumbrance on her Jointure, and barring an Eſtate in Tail Male, and they limit the Uſes to the Husband for Life, Remainder to the Wife for Life, Remainder to their two Daughters; this does not make the Daughters Purchaſers, ſo as to ſhut out a Judgment-Creditor of the Huſband's antecedent to the Barring the Eſtate-tail, for it is a voluntary Gift from the Wife to the Husband. *Trin.* 1700. between *Ball* and *Burnford*.

## (B) Purchaſers, in what Caſes favoured in Equity.

1. A Purchaſer came into a Man's Study, and there laid Hands on a Statute that would have fallen on his Eſtate, and put it up in his Pocket, and he having thereby obtained an Advantage in Law, tho' ſo unfairly, and by ſo ill a Practice, yet the Court would not take that Advantage from him. Sir *John Fagg*'s Caſe, cited 1 *Vern.* 52, 53. 2 *Vern.* 159. *S. C.* cited.

2. If a Releaſe be obtained from a Grantee of a Rent-Charge, without any Conſideration, and by Fraud, yet a Purchaſer will be admitted to take Advantage of it. Between *Harcourt* and *Knowel*, 2 *Vern.* 159. cited to be adjudged by *Rawlinſon* Lord Commiſſioner.

3. The Plaintiff and Defendant had each of them purchaſed a Reverſion expectant on the Death of Tenant for Life; the Plaintiff brought his Bill, that he might preſerve their Teſtimony, and be admitted to try his Title in the Life-time of Tenant for Life; but for as much as the Purchaſer was a Defendant, the Court would do nothing in it, and he loſt the Land for Want of examining his Witneſſes. *Vide Willis Rep.* 5 *ante* 223. *Preſ. Ch.* 103. Between

Between *Seybourne* and *Clifton*, 2 *Vern.* 159. cited by Lord *Commiſſioner Rawlinſon*. *Vid.* 1 *Vern.* 354.

4. If a Purchaſer buys in an old Statute or Mortgage, tho' nothing be due upon it, yet he ſhall be admitted to defend himſelf by it at Law; but for this *vid.* how far a ſubſequent Mortgagee ſhall defend himſelf by buying in a precedent Incumbrance, Title *Mortgage*, and 1 *Vern.* 50, 187. 2 *Vern.* 29, 30, 81, 271.

5. *A.* purchaſed the Manor of *D.* in which were certain Lands called *B.* and *P.* the Manor, at the Time of the Purchaſe, was in Mortgage for a Term of Years, and the Mortgage was paid off, and the Term aſſigned in Truſt to attend the Inheritance; afterwards *A.* upon the Marriage of his Son, ſettles Part of theſe Lands, and amongſt them the Lands called *B.* and *P.* but no Care was taken of the Mortgage-Term, that ſtood out; afterwards *A.* being in Poſſeſſion contracts with the Defendant to ſell him all the ſaid Manor, except the Lands called *B.* and *P.* but ſhews Part of the Lands of *B.* and *P.* as Part that he would ſell, but the Defendant did not know that any Part of the Lands were called by that Name; and in the Conveyance to the Defendant there is an Exception of Lands called *B.* and *P.* After the Purchaſe-money paid, the Defendant was evicted of Part of the Lands called *B.* and *P.* (which he did not know by that Name, for they had been ſhewn to him as Part of his Purchaſe, and he had paid for them) by the Plaintiff, who claimed under *A.*'s Son; upon which the Defendant having found the old Term that was on Foot at the Time of *A.*s Purchaſe, and got an Aſſignment of it, upon which the Plaintiff brought his Bill to be relieved, and to have an Aſſignment of the Term; and that as to the Lands called *B.* and *P.* he was no Purchaſer of them, for they were expreſly excepted in his Conveyance. But my Lord *Chancellor* was of Opinion, that theſe Lands being ſhewn to the Defendant as Part of his Purchaſe, and he not knowing them to be excepted by the Name of *B.* and *P.* was in Equity a Purchaſer of them; and the Court ought not to aſſiſt in defeating of him, and therefore diſmiſſed the Bill as to all the Lands purchaſed by him. *Mich.* 1698. between *Oxwick* and *Brockett*.

6. *A.* on his Marriage ſettled Lands, which were intailed on his Wife for a Jointure; his Brother was privy to the Marriage, and ingroſſed the Jointure-Deed, and concealed the Intail; *A.* died without Iſſue, having deviſed the Lands to *J. S.* the Brother recovered in Ejectment; on a Bill brought by the Jointreſs and *J. S.* for Relief, the Brother confeſſed that he was privy to the Marriage-Treaty, and ingroſſed the Jointure-Deed, and that he had then the Deed of Intail in his Hands, but did not mention his Title, nor diſcover the antient Deed of Intail, becauſe he apprehended his Brother would dock the Intail; and the Court decreed the Jointreſs to hold and enjoy her Jointure againſt the Brother and all claiming under him, and a perpetual Injunction againſt the Judgment in Ejectment; but as to *J. S.* who claimed the Reverſion and Inheritance by a voluntary Deviſe, the Bill was diſmiſſed; and this Decree was affirmed in the Houſe of Lords. *Mich.* 1691. between *Raw* and *Pole*, 2 *Vern.* 239.

7. So where a Mother, who was abſolute Owner of a Term, was preſent at a Treaty for her Son's Marriage, and heard her Son declare, that the Term was to come to him at his Mother's Death, and was a Witneſs to the Deed, by which the Reverſion of the Term was

was ſettled on the Iſſue of that Marriage; and on a Bill brought by the Iſſue of that Marriage, ſhe was compelled to make good the Settlement, and to ſettle the Reverſion of the Term accordingly. *Trin.* 1690. between *Hunſden* and *Cheyney*, 2 *Vern.* 150.

8. So where a younger Brother, having an Annuity of 100 *l. per Ann.* charged on Lands by his Father's Will, contracted with *A.* to ſell him this Annuity; *A.* goes to *B.* the elder Brother, and tells him he was about to buy this Annuity of his younger Brother, and deſired to know if his younger Brother had a good Title to it, and whether his Father was ſeiſed in Fee at the Time of Making the Will, and whether the Will was ever revoked; *B.* told him he believed his Brother had a good Title to it, and that he had paid him his Annuity theſe twenty Years; but withal, told him, that he heard there was a Settlement made of his Father's Lands before the Will, and that the ſaid Settlement was in the Hands of *J. S.* and that he had never ſeen it, and therefore could not tell him what the Contents of it were, but incouraged him to proceed in his Purchaſe, telling him, he had not only paid his Brother his Annuity to that Time, but had paid his Siſters 3000 *l.* under the ſame Will; afterwards *B.* gets a Settlement in his Hands, by which the Land out of which the Annuity iſſued was intailed, and would thereby avoid this Annuity: But on a Bill by *A.* to have the Annuity paid, or the Purchaſe-money back again, the Court decreed Payment of the Annuity, purely on the Incouragement given by the elder Brother. *Hill.* 1682. between *Hobbs* and *Norton.*

9. *A.* poſſeſſed of a Term for 100 Years, in 1638 made his Will, and *B.* who married his Daughter, Executor, and deviſed the Term to his own Wife; the Executor aſſented, ſhe entred, and after three Years died; after her Death the Executor entred and enjoyed the Term till 1650, and then ſold it to one, who ſurrendred, and then took a new Leaſe for 200 Years, and laid out 250 *l.* in Building on the Premiſſes; *B.* died, and his Wife ſurvived him till the Year 1669. *J. S.* who married the Daughter of *B.* being beyond Seas twenty Years, and not knowing of his Title, came into *England* in 1670, and being informed of this whole Matter, and of his Title in Right of his Wife, took Adminiſtration to the Wife of *A.* and recovered by Virtue of the Term for 100 Years in an Ejectment; the Purchaſer and Builder exhibited a Bill to be relieved againſt this dormant Title: And *Grimſton*, Maſter of the *Rolls*, the Poſſeſſion going ſo long, and divers Purchaſers, and the laſt Purchaſer under the new Term having no Notice of the old, or of the dormant Title to the Reſidue of the Term of 100 Years, adjudged the Purchaſer ſhould be relieved, and hold the Land till he was repaid his Charges in Building, diſcounting the Profits recieved after the Purchaſe, which *J. S.* perceiving, and that the Value would not exceed 22 *l. per Ann.* and that the Reſidue of the old Term was only for thirty-two Years, he agreed (by Advice of the Maſter of the *Rolls*) to take 80 *l.* of the Purchaſer, and to releaſe his Title to the old Term. *Mich.* 27 *Car.* 2. between *Edlin* and *Battaly*, 2 *Lev.* 152. *in Canc'.*

10. The Plaintiff having a Leaſe of certain Mills for twelve Years, which were near expired; the Leſſor, on his Marriage, makes a Settlement of theſe Mills to the Uſe of himſelf for Life, then to the firſt and other Sons of that Marriage in Tail Male, Remainder to his

own right Heirs; afterwards the Plaintiff takes a new Leaſe of theſe Mills from the Father for thirty Years, and lays out 2800 *l.* in new Building and Improving them; the Defendant was the eldeſt Iſſue Male of the Leſſor, and during the Time the Plaintiff was making theſe Improvements, went to his Father, and told him, he had no Power to make any ſuch Leaſe; that after his Death the Eſtate would be his, but never acquainted the Plaintiff with this, or of the Settlement made on his Father's Marriage; but on the contrary, writ to the Plaintiff to take Care to keep one of the Mills in particular in Repair; then the Father dies, and the Son recovers in an Ejectment againſt the Leſſee, who thereupon brought his Bill to be quieted in the Poſſeſſion of the Mills during the Reſidue of his Leaſe, for that the Defendant was fully acquainted with the Circumſtances of this Leaſe, knew his Father had no Power to make it, and yet never forbid or cautioned the Plaintiff from going on with his Repairs, but on the contrary, ſtood by and ſaw them, and encouraged him in the Proceeding therein; and therefore the Plaintiff had a Decree to hold during the Reſidue of his Term; for though the Defendant was not privy to the making of this Leaſe, but that was only the Fraud of the Father; yet he being to have the Eſtate after his Father's Death, and taking Notice thereof to his Father, and that he had no Power to make any ſuch Leaſe, and yet ſuffering the Plaintiff to go on in his Repairs thereof, with a Deſign to reap the whole Benefit thereof when his Father was dead, was ſuch a Fraud and Practice in him as ought to be diſcountenanced in this Court, for *Qui tacet aſſentire videtur*; and therefore it was decreed that the Plaintiff ſhould enjoy for the Reſidue of his Leaſe. *Paſch.* 1712. between *Hanning* and *Ferrers*.

11. The Plaintiff's Wife, before her Intermarriage with the Plaintiff, being poſſeſſed of a Term for Years as Executrix to her firſt Husband, and which was liable as Aſſets to the Payment of his Debts, in order thereto, and to raiſe Money for that Purpoſe, the Plaintiffs, after their Marriage, entred into an Agreement with the Defendant, for Sale of the Houſe in Queſtion for the Reſidue of the Term, for 450 *l.* whereof 210 *l.* was to be applied in Diſcharge of a Mortgage thereon, to one *J. S.* and the remaining 240 *l.* was to be paid to the Plaintiffs; accordingly the Plaintiffs executed an Aſſignment of the Houſe to the Defendant, with a Receipt indorſed thereon for the whole Purchaſe-money; but the Defendant did not then pay the Purchaſe-money, but gave a Note for the Payment of 210 *l.* Part thereof to *J. S.* the Mortgagee, and of the remaining 240 *l.* to the Plaintiffs; and for the Non-payment thereof the Plaintiffs brought their Bill to have a ſpecifick Performance, and Payment of the Money accordingly. The Defendant, by his Anſwer, admitted the whole Caſe to be as above ſet forth, but inſiſted, that he ought not to be bound thereby, for that the Plaintiffs could not make him a good Title, they having, by Articles before Marriage, agreed to ſettle this Houſe for the Benefit of themſelves and their Iſſue, of which he had no Notice at the Time of his Purchaſe; and for Diſcovery of theſe Articles, and to have up his Note on a Re-aſſignment of the Houſe the Defendant brought his Croſs-Bill; the Plaintiffs, by their Anſwer, admitted there were ſuch Articles, but inſiſted, that the Houſe lying in *Middleſex*, thoſe Articles were never regiſtered in the *Middleſex* Office, and therefore void, as againſt the Plaintiff; but on a Hear-

ing at the *Rolls*, the Maſter of the *Rolls* decreed the original Bill to ſtand diſmiſſed, with Coſts; and on the Croſs-Bill decreed the Note given for the Purchaſe-Money to be delivered up on a Re-aſſignment of the Houſe; and the Plaintiff in that Cauſe likewiſe, to have his Coſts, by Reaſon of the Plaintiff's Fraud in concealing the Articles; and this Decree was affirmed by my Lord *Chancellor*. *Mich.* 1727. between *Beatniff* and *Smith*.

12. So in a Caſe between two Purchaſers of Lands in *Yorkſhire*, where the ſecond Purchaſer having Notice of the firſt Purchaſe, but that it was not regiſtered, went on and Purchaſed the ſame Eſtate and got his Purchaſe regiſtered; yet it was decreed, that having Notice of the firſt Purchaſe, though it was not regiſtered, bound him, and that his getting his own Purchaſe firſt regiſtered was a Fraud, the Deſign of thoſe Acts being only to give Parties Notice, who might otherwiſe, without ſuch Regiſtry, be in Danger of being impoſed on by a prior Purchaſe or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, tho' not by the Regiſtry. Between *Blades* and *Blades*, by my Lord *Chancellor King* decreed.

## (C) Where a Purchaſer, who purchaſes from a Perſon who has only a Power to ſell, muſt ſee that the Purchaſe-money is rightly applied.

1. IF Lands are appointed for Payment of Debts, the Purchaſer, though there reſults a Truſt to the Heir, is not concerned whether the Perſonal Eſtate was ſufficient to pay the ſame, or whether too much was ſold, or the Creditors paid; for he having paid the Purchaſe-Money ſhall hold againſt the Heir and Creditors, and their Remedy muſt be againſt the Truſtee or Perſon impowered to ſell. 2 *Chan. Ca.* 115.

2. But if Lands are deviſed to be ſold for Payment of Debts in a Schedule, in that Caſe the Purchaſer is bound to ſee the Purchaſe-money applied to the Payment of thoſe Debts; but if the Truſt be general, to pay Debts, tho' he has Notice of them, yet the Purchaſer is not obliged to ſee the Money applied. *Mich.* 1692. between *Abbot* and *Gibbs*, 1 *Vern.* 301. *S. P.*

3. If Lands are veſted in Truſtees by Act of Parliament, to be mortgaged for a particular Purpoſe, it is incumbent on the Mortgagee to ſee the Money applied accordingly. *Trin.* 1686. between *Cotterel* and *Hampſon*, 2 *Vern.* 5.

4. *A.* had an Intereſt for a Term for Years in a Printing-Office, and made his Will, and deviſed his Term in the Printing-Office to his Executors, in Truſt, by Profits, *&c.* to raiſe 2000 *l.* for the Portion of his Daughter, and then for other Truſts, and died; the Executors mortgage this Term for 1000 *l.* to *J. S.* on Pretence of Want of Aſſets to pay the Teſtator's Debts; and the Plaintiff, the Aſſignee of the Mortgagee, brings his Bill to foreclоſe the Equity of the Redemption; the Daughter oppoſed it, and inſiſted this Mortgage ought not to take Place till her Portion was raiſed, for that the ſaid Term was deviſed to the Executors in Truſt for that Purpoſe in the firſt place, and the Mortgagee could not but have Notice of it; and that there

were no Debts of the Teſtator; or if any, the Mortgagee at his Peril ought to ſee the Money applied to diſcharge them, and to be allowed no more than he could make out to be ſo applied. Lord *Keeper*: Where a Truſt is to ſell for Payment of Debts in a Schedule, the Purchaſer at his Peril is to ſee the Money applied to the Payment of thoſe Debts; but here the Queſtion is, how far an Executor's Power does extend over a Chattel which has a Truſt annexed to it; the Law has intruſted the Executor with the Perſonal Eſtate to pay Debts; and unleſs he has a general Power, he has none at all; for if he cannot ſell, none can buy, and the general Truſt muſt take Place; and a Purchaſer is not bound to prove the Debts, or the Number of them, or the Application of the Purchaſe-Money; therefore the Sale is good; but after, on Appeal to the Houſe of Lords, they altered this Decree; and preferred the Portion. *Quære Cauſam inde. Mich.* 1703. * between *Humble* and *Bill.*

* 2 Vern. 444. S. C.

# CAP. XLVIII.

# Remainder.

## (A) Of what Things a Remainder may be made.

1. IF one hath the Office of Park-keeper, Foreſter, Gaoler, Sheriff, *&c.* to him and his Heirs, he may grant theſe Offices to one for Life, Remainder to another for Life, *&c.* for *Omne majus continet in ſe minus*; and as they are grantable over in Fee, ſo may they be granted in Succeſſion to one for Life, with Remainders over, *&c.* So of Lands, Houſes, Rents, Commons, Eſtovers, or any other Intereſt or Profit *in eſſe*, wherein the Grantor hath the abſolute Property to him and his Heirs for ever. *Plow.* 479. *b.* 381. *a.* 2 *Co.* 48, 97.

2. But where a Man ſeiſed of Lands in Fee granted thereout a Rent-charge to one for Life, or Years, Remainder over to another in Fee, or in Tail, *&c.* and it was doubted if this Remainder were good, becauſe this Rent had no Exiſtence at all before the Grant, and the Grantor cannot be ſaid to have any Part of the Rent left in him, as he would have of Land, becauſe he firſt gave Being to the Rent,

Rent, and bounded the Time of its Exiſtence; which being run out, nothing thereof remains to grant over to another, and a Remainder is to be granted out of that which would otherwiſe be a Reverſion in the Grantor; which here this Rent cannot be, being newly created; but yet in this Caſe, by the better Opinion of the Books, and a * Judgment directly in Point, ſuch Remainders of a Rent newly created have been held good; for as the Grantor might at firſt have granted it in Fee, or for ever, having ſuch perpetual and durable Intereſt in the Fund, out of which it was to ariſe; ſo he may Share and divide his Grant, and give Part thereof to one, and Part to another, in Succeſſion; and the rather, becauſe the particular Eſtate and Remainders are but one Eſtate as to the Grantor, divided in Limitation only, being limited to paſs out of him all at the ſame Time; and as to him make no Difference, whether the one or more take Benefit jointly, or in Succeſſion one after another; but if he grant ſuch Rent for Life, or Years, to one, without going farther, he cannot after grant the Reverſion thereof to another, becauſe he has no Reverſion in him, for the Reaſon before given; and the Reaſons of this Caſe will go likewiſe to Commons, Eſtovers, *&c.* newly created. 2 *Rol. Abr.* 415. 2 *Co.* 70, 76, 78. 1 *Lev.* 144. 1 *Sid.* 285. 2 *Keb.* 29.

* 2 Salk. 577. 2 Lutw. 1225.

3. If one be created Baron, Viſcount, *&c.* by Patent, and after, in the ſame Patent, the ſame Honour is granted to another in Remainder; yet this operates as a new Grant, and not as a Remainder, for the King had no Reverſion of that Honour in him, though he had ſtill the ſame Power of appointing one in Succeſſion to take it, as he had of Granting it to the firſt. *Show. P. C.* 5, 11.

4. But what ſeems moſt proper to be inquired into under this Head, is the Reaſon and Practice of limiting Remainders in Perſonal Goods, or Chattels, for they in their own Nature ſeem incapable of ſuch a Limitation, becauſe being Things tranſitory, and by many Accidents ſubject to be loſt, deſtroyed, or otherwiſe impaired; and alſo the Exigences of Trade and Commerce requiring a frequent Circulation thereof, it would put a Stop to all Trading, and occaſion perpetual Suits and Quarrels, if ſuch Limitations were generally tolerated and allowed; but yet in Laſt Wills and Teſtaments ſuch Limitations over of Perſonal Goods or Chattels have ſometimes prevailed, eſpecially where the firſt Deviſee had only the Uſe or Occupation thereof deviſed to him; for then they held the Property to continue in the Executors of the Teſtator, and that the firſt Deviſee had no Power to alter or take it from them; yet in either Caſe, if the firſt Deviſee did actually give, grant or ſell ſuch Perſonal Goods or Chattels, the Judges would very rarely allow of Actions to be brought by thoſe in Remainder, for Recovery thereof; hence it came to paſs, that it was a long While ere the Judges of the Common Law could be prevailed on to have any Regard for a Deviſe over, even of a Chattel Real, or a Term for Years after an Eſtate for Life limited thereon; becauſe the Eſtate for Life being in the Eye of the Law of greater Regard and Conſideration than an Eſtate for Years, they thought he, who had it deviſed to him for Life, had therein included all that the Deviſor had a Power to diſpoſe of; and though they have now gained that Point upon the Ancient Common Law, by eſtabliſhing ſuch Remainders, and have thereby brought that Branch out of the Chancery (where they frequently helped the Remainder-man, by allowing of Bills to compel the firſt Deviſee to give Security); yet it

was at firſt introduced into the Common Law, under the new Name of *Executory Deviſe*, and took all the Sanction it has ſince received from thence, and not as a Remainder, (for which *vid.* Title *Deviſe*); but as to Perſonal Goods and Chattels, the Common Law has provided no ſufficient Remedy for the Deviſee in Remainder of them, either during the Life of the firſt Deviſee, or after his Death; therefore the Chancery ſeems to have taken that Branch to themſelves in Lieu of the other which they loſt, and to allow of the ſame Remedy for ſuch Deviſee in Remainder of Perſonal Goods and Chattels, as they before did to the Deviſee in Remainder of Chattels Real, or Terms for Years. *Dyer* 7. *Cro. Car.* 347. *Plow.* 521. *a. Godolph.* 356. *Swinb.* 137.

5. Therefore where a Man deviſed 600 *l.* a-piece to two Daughters, and the Reſidue of his Perſonal Eſtate to his Son, and if either of his Children died during their Minority, the Survivors to be Heirs to the Deceaſed by equal Portions; the Son died, and one Siſter brought a Bill againſt the Executors and the other Siſter, to have her own 600 *l.* and the Half of the Brother's Perſonal Eſtate, and had a Decree accordingly, but was forced to give Security to pay back her own 600 *l.* in caſe ſhe died during her Minority; though it was ſaid, if ſhe died during Minority, leaving Iſſue, it would be a hard Caſe. 1 *Chan. Ca.* 199.

6. A Deviſe was made of the Uſe of Goods, Plate and Houſhold-ſtuff, to one for eleven Years, and after to another, and held a good Deviſe; and a Decree to deliver them accordingly after the eleven Years. Between *Folly* and *Wills*, 2 *Chan. Rep.* 137.

7. So upon a Deviſe of certain Books, Jewels and Rarities to one for Life, and after of the Things themſelves to another; he in the Remainder brought a Bill in the Life-time of the firſt Deviſee to have Security for their forthcoming after the Death of the firſt Deviſee; and the Court being aſſiſted by two Judges held the Remainder good, but ordered them to move for the Security another Time. Between *Vachell* and *Leman*, 2 *Chan. Rep.* 151.

8. A Farmer deviſed his Stock (which conſiſted of Corn, Hay, Cattle, *&c.*) to his Wife for Life, and after her Death to the Plaintiff; it was objected, that no Remainder can be limited over of ſuch Chattels as theſe, becauſe the Uſe of them is to ſpend and conſume them; but the Maſter of the *Rolls* ſaid, the Deviſe over was good; but ſaid, if any of the Cattle were worn out in uſing, the Defendant was not to be anſwerable for them; and if any were ſold as uſeleſs, the Defendant was only to anſwer the Value of them at the Time of the Sale; and an Account was decreed to be taken accordingly. *Mich.* 1702. between *Hayle* and *Burrodale.*

9. The Diſtinction which has been taken between the Deviſe of a Perſonal Thing to one for Life, Remainder to another, and the Uſe thereof to one for Life, with a Remainder over, ſeems now exploded in Conformity to the Civil Law; and likewiſe as the Teſtator's Intention appears the ſame in both Caſes. 37 *H.* 6. 1 *Brok.* 254. (57) Title *Deviſe*, 13 *Co.* 5, 16. *Owen* 33. 2 *Vern.* 245.

10. Therefore if a Man deviſes Houſhold-Goods to his Wife for Life, and afterwards to his Son, this is a good Deviſe over, and the ſame as if the Deviſe had been only of the Uſe of the Goods to the Wife for Life. *Mich.* 1696. between *Hide* and *Parrot*, 2 *Vern.* 331. decreed. Between *Gibbs* and *Barnardiſton*, *S. P. Hill.* 1711. decreed.

11. But if Money, Goods, or other Perſonal Chattels, are deviſed to one and the Heirs of his Body, or to one, and if he dies without Heirs of his Body, the Remainder; this Remaindor is totally void, and the Courts of Equity will not allow of a Bill by the Remainderman to compel Security, *&c.* or to have the Money, *&c.* after the Death of the firſt Deviſee; but it ſhall go to his Executors or Adminiſtrators; for the firſt Deviſe gives the abſolute Property of a Perſonal Eſtate, as a like Deviſe of a real Eſtate before the Statute *de donis* gave a Fee, upon which no Limitation could be made further; and as the Heirs are the Repreſentatives to take a real Eſtate, ſo are the Executors to a perſonal Eſtate; and this is not within the Statute *de donis*, but remains as at Common Law. 2 *Vent.* 349. 2 *Chan. Ca.* 94. 2 *Chan. Rep.* 66, 153. 1 *Chan. Rep.* 122, 260. 1 *Vern.* 329. 1 *Salk.* 156. 2 *Vern.* 600.

12. And yet where a Deviſe was of Money and Goods to one for Life, and if the Deviſee died without Iſſue, then to go over to another, this was held a good Deviſe over; for the firſt Limitation being expreſly for Life, the Words after could not inlarge it by Implication, as they could a Real Eſtate, and then it falls within the common Rule of other Caſes, where the Limitation is held good, the Contigency being to happen within the Compaſs of a Life or Lives *in eſſe*. 1 *Chan. Rep.* 411. but for this *vid.* of executory Deviſes of Terms for Years, Title *Deviſes*.

13. So where *A.* deviſed in the Words following, *viz. And the Reſt and Reſidue of my Eſtate unbequeathed ſhall be put forth to Intereſt by my Executors, and the one Half of the Intereſt ſhall be paid to my Siſter* A. C. *during her Life, and the other Half of the Intereſt unto her Daughter* A. S. *and ſhe to have one Half of my Houſhold Goods, and after her Mother's Deceaſe to have all the Intereſt during her Life; and my Will is, that if the ſaid* J. S. *die without Iſſue of her Body, the Principal of the Reſidue ſhall be divided equally between* M. *and* F. *and ſuch Children as are or ſhall be born of their Bodies then living*; and it was held, that the Remainder to *M.* and *F.* was good. *Paſch.* 1688. between *Smith* and *Clever*, 2 *Vern.* 38, 59.

14. A Term for 900 Years was aſſigned to Truſtees, in Truſt to permit the Husband and Wife, and the Survivor of them, to receive the Profits for ſo many Years of the Term, as they or the Survivor of them, ſhould happen to live; and after their Deaths to the Uſe of the Heirs of the Body of the Wife, by the Husband to be begotten; and it was held, that the Heir of the Body took by Purchaſe, and that it did not veſt abſolutely in the Mother, who ſurvived, ſo as to go to her Adminiſtrator. *Mich.* 1690. between *Peacock* and *Spooner*, 2 *Vern.* 43, 195. decreed, and affirmed in the Houſe of Lords.

15. But afterwards a Decree at the Rolls, grounded upon the Caſe of *Peacock* and *Spooner*, was reverſed, and decreed the Limitation to the Heir Male void; and that the Whole veſted in the Father by the Limitation to him for Life, Remainder to the Heirs of his Body. *Hill.* 1710. between *Webb* and *Webb*, 2 *Vern.* 668.

16. *A.* being poſſeſſed of an Annuity of 14 *l. per Ann.* for ninety-nine Years, out of the Exchequer, on his Marriage covenants with *B.* and *C.* to pay this 14 *l. per Ann.* to his Wife for her ſeparate Uſe, and after the Death of either of them, then to the Survivor for Life; and after the Death of both, then to the Child or Children to be begotten between them; and in Default of ſuch Child or Children,

then to his own Executors and Adminiſtrators for the Reſidue of the Term; *A.* and his Wife had Iſſue only one Son, who lived to the Age of five Years, and then died; and after the Death of *A.* and his Wife, the Plaintiff took out Adminiſtration to the Son, and brought his Bill againſt the Executors of *A.* for this Annuity; and it was inſiſted upon, that the Limitation to the Executors and Adminiſtrators of *A.* was void, being after a Limitation to the Child and Children, which was the ſame as if it had been limited to the Iſſue; and a Settlement of a Term on Truſtees, in Truſt to permit the Father to receive the Profits for ſo many Years of the Term as he ſhould live, and after to permit the Mother to receive the Profits for ſo many Years of the Term as ſhe ſhould live, and then in Truſt to permit their Child or Children, or Iſſue, to receive the Profits for the Reſidue of the Term, will bear no Limitation over in Default of Iſſue or Children, in Caſe there be any one in Being, no more than ſuch a Limitation of the Term it ſelf would be good; for this would be to introduce and revive all the Inconveniencies of a Perpetuity, which have been ſo long ſince exploded, and the Truſt of a Term muſt be limited in the ſame Manner, as the Term it ſelf will bear a Limitation. But my Lord *Chancellor* ſaid, this being by Way of Covenant, no more paſſed out of him than to ſerve the Uſes expreſſed; and it was not a Diſpoſition of the Annuity it ſelf, but only a Covenant to pay the 14 *l. per Ann.* in ſuch Manner; and ſince it was never deveſted out of *A.* he would not, on this Bill, on any Pretence of Equity, tear it out of him or his Executors, and ſo diſmiſs'd the Bill, though he did not at all diſpute the Caſe, if it had been of a Term, or the Truſt of a Term, ſettled in ſuch Manner, that the Remainder would not have been good; but here there was only a Covenant to pay the 14 *l.* and not the Annuity itſelf, which was thought, at the Bar, to be an over nice Diſtinction. *Trin.* 1715. between *Baſſe* and *Grey*.

vide 1 Pr. Wms 132. 290. 98. 132. 534. 663.
2 Pr. Wms 421. 608. 609. 618.
Salk. 156.
2 Vern. 600.

## CAP. XLIX.

# CAP. XLIX.

## Rent.

(A) In what Cases there may be Remedy for Rent in Equity, when none at Law.

(B) In what Cases the Lessee may be relieved against the Payment of Rent in Equity.

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### (A) In what Cases there may be Remedy for Rent in Equity, when none at Law.

1. IF a Rent be devised by Will in Writing, a Court of Equity may compel the Tenant of the Land to give Seisin, because by Intendment the Tenant of the Land was *Inops Consilii* at the Time of the Devise. *Moor* 805. *Lat.* 147.

2. So if a Man grants a Rent-seck, Equity will decree Seisin to be given, and the Rent to be paid to the Grantee. 1 *Rol. Abr.* 378. 1 *Chan. Ca.* 147.

3. A Bill was exhibited for the Payment of 3 *l.* for a Rent of 5 *l. per Ann.* Arrear, for twelve Years, suggesting that the Deed by which it was created was lost; and there being Proof that it was constantly paid before the twelve last Years, the Master of the *Rolls* decreed that the Arrears and growing Rent should be paid, because it did not appear what Kind of Rent it was, and so no Remedy at Law. *Hill.* 20 & 21 *Car.* 2. between *Collet* and *Jaques*, 1 *Chan. Ca.* 120.

4. So where a Bill was brought, suggesting, that the Plaintiff did not know the Nature of the Rent, nor the Boundaries of the Land, so as to be able to declare with Exactness; and the Court said, that it ought to be decreed; but at the Importunity of the Defendant directed a Trial, whether there was any such Grant, or not. 1 *Vern.* 359.

5. A Rent of 1 *l.* 14 *s.* was granted by King *H.* 6. to *Eaton* College, issuing out of certain Lands; the Bill suggested, that the College did nor know where the Lands lay, so as to enable them to distrain, and therefore pray that the Executor of the Tertenant may be answerable for the Arrears; which the Master of the *Rolls* thought reasonable, in Respect that the Personal Estate was increased thereby; and decreed it accordingly. 1 *Chan. Ca.* 121.

6. So where the Plaintiff by his Bill ſuggeſted, that he having the Grant of a Rent-charge iſſuing out of certain Lands, the Defendant, to hinder him from a Diſtreſs, converted the Premiſſes into Tillage; and my Lord Chancellor directed to have it tried, whether there was any Fraud uſed to prevent the Plaintiff from diſtraining, and declared, that if there was, he would grant Relief. 1 *Chan. Ca.* 144.

7. *A.* ſeiſed of an Eſtate, deviſed it to *B.* and thereout deviſed 100 *l. per Ann.* to his Father, payable half-yearly, and in Default of Payment, to enter and diſtrain, and the Diſtreſs to detain until the Arrears paid; the Father dying, his Widow and Executrix brought her Bill for Satisfaction of the Arrears; and the Maſter of the *Rolls* decreed the Arrears with Coſts and Charges, and ſhe to enter and enjoy until ſatisfied. *Mich.* 1700. between *Foſter* and *Foſter*, 2 *Vern.* 386. but *vid.* 2 *Vern.* 382, where on a like Bill my Lord *Keeper* refuſed to relieve the Plaintiff; the Party having provided a Remedy by Diſtreſs, muſt be ſatisfied with it, unleſs ſome particular Fraud is proved, as letting the Land lie freſh, or depaſturing it in the Night-time, to prevent a Diſtreſs; and 1 *Chan. Ca.* 185. that Equity will not grant a Remedy for Rent, when there is one at Law, nor change the Nature of the Rent, ſo as to make the Perſon liable, unleſs there was Fraud, *&c.* in preventing a Diſtreſs.

## (B) In what Caſes the Leſſee may be relieved againſt the Payment of Rent in Equity.

1. THE Plaintiff was Tenant to the Lady *M.* of a Houſe in *London* at a certain Rent; he left the Houſe and went to *Oxon* to King *Charles* I. and then ſent his Servant with the Key of the Houſe to the Lady, and deſired her to re-enter and accept the Surrender; ſhe ſaid ſhe would adviſe with the Defendant, her Son in Law, (who then ſat in the Houſe of Commons, and was on the Side of the Parliament;) afterwards ſhe refuſed to accept of a Surrender; the Houſe was made an Hoſpital by the Parliament for maimed Soldiers; the Defendant, as Executor to the Lady, brought Debt at Law againſt the Plaintiff for Rent incurred whilſt the Houſe was ſo uſed; and on a Bill to be relieved againſt the Action, my Lord *Chancellor* took Time to adviſe; but declared, that if he could, he would relieve the Plaintiff. *Paſch.* 19 *Car.* 2. between *Harriſon* and Lord *North*, 1 *Chan. Ca.* 83.

2. A Leſſee for Years under a certain Rent, and Covenants to repair, makes 100 Under-leaſes; the Premiſſes not being repaired, nor the Rent paid, a Re-entry is made, and the original Leaſe avoided, *Six* of the Under-Leſſees having brought a Bill againſt the Head Landlord and firſt Leſſee *& al'*; the Court held, that there could be no Decree to apportion the Head Landlord's Rents, nor any Relief for the Plaintiffs, but on their Payment of the whole Rent in arrear, and Repairing all the Premiſſes; but having ſo done, they might compel the reſt of the Under-tenants to contribute. 2 *Vern.* 103.

# CAP. L.

# Tithes.

(A) Tithes, of what Things due, and by whom to be paid.
(B) Of a Modus.

## (A) Tithes, of what Things due, and by whom to be paid.

1. THough Beaſts of the Plough are exempt from paying Tithes, becauſe by the Labour of ſuch Cattle Tithes of another Kind ariſe; yet if Oxen are turned to Graſs, and fatted for Sale, they ſhall from ſuch Time pay Tithe for the Herbage they eat, being no Way beneficial to the Parſon in any other Tithes. Between *Edmond* and *Sandys*, *Show. P. C.* 192.

2. A Bill was exhibited to be relieved for Tithe Oar in *B.* a Townſhip within the Rectory of *C.* and the Court held, that Tithe Oar was not due of common Right, but by particular Cuſtom only, and therefore directed a Trial to be had at Law, whether there was any, and what Cuſtom, within the ſaid Townſhip for the Payment of Tithe Oar, with Direction to the Judge to indorſe the *Poſtea*, how the Cuſtom was found upon the Trial. *Paſch.* 1688. between *Niccol* and *Wiſeman*, 2 *Vern.* 46.

3. It was decreed in the Houſe of Peers, on Appeal from the Court of Exchequer, that the Tithes of a Mill are perſonal Tithes, againſt ſeveral ſeeming Authorities or Doubts in the Books; and that in Conſequence of their being perſonal Tithes, not the tenth Toll or tenth Diſh of the Cornground belongs to the Parſon, but the tenth Part of the clear Profits, after the Charges of erecting the Mill, and the other Charges of Servants, Horſes and other Expences deducted. Between *Newt* and *Chamberlain*, 1706.

4. If a Man hath a Nurſery of Trees, and he ſells them, and pulls them up himſelf, he ſhall pay the Tithe; but if he ſells them particularly to another, the Vendee ſhall pay the Tithes, as in Caſe of Tithe of Corn, if ſold ſtanding, the Vendee ſhall pay the Tithes; but

if ſold after Severance, the Vendor muſt. *Mich.* 16 *Car.* 2. between *Grant* and *Hedding*, *Hard.* 380, 381.

5. Tithes for the Agiſtment of Cattle are payable by the Owner of the Cattle, for the Cattle take the Profits and Herbage of the Soil; ſo in Caſe of Commoners. *Hard.* 184. *per Curiam*; and the Chief *Baron* ſaid, the Owner of the Soil might pay them; but clearly, the Agiſtor is compellable to pay them.

## (B) Of a Modus.

1. A Bill was exhibited to examine Witneſſes *in perpetuam rei Memoriam*, to prove a *Modus Decimandi*; the Defendant demurred, for that the Bill was to eſtabliſh a Cuſtom againſt the Church, and in Prejudice of Tithes that are due *Communi Jure*; and ſeveral Precedents were cited, where Bills to have a *Modus* (*a*) decreed, were, upon Demurrer, diſmiſſed; but this Bill being only to preſerve Teſtimony, the Lord Keeper thought it reaſonable the Defendant ſhould anſwer, and over-ruled the Demurrer. *Trin.* 1683. between *Somerſet* and *Fotherby*, 1 *Vern.* 185.

(*a*) It was formerly doubted, whether a Bill in Equity would lie to eſtabliſh a *Modus*, or cuſtomary Manner of paying Tithes, eſpecially if the Cuſtom had not been found good at Law; and ſometimes on a Demurrer to ſuch Bills, they have been diſmiſſed; but the conſtant Practice now is, to retain ſuch Bills, and to decree on the Pleadings, or to direct a particular Point to be tried at Law, concerning the Reality of ſuch a Cuſtom, or the Legality of it. 1 *Chan. Rep.* 27. 1 *Chan. Ca.* 187.

2. A Bill was brought to eſtabliſh a *Modus*, or cuſtomary Manner of Payment of Tithes, which was thus, that every Perſon not inhabiting or reſiding within the Pariſh, having Lands, Meadow or Paſture Grounds, have uſed to pay for every Acre, Time out of Mind, on *Good Friday*, 4 *d. per* Acre, and ſo in Proportion for a greater or leſſer Quantity than an Acre, to the Parſon, in Lieu of Tithes of thoſe Lands; but when the Owner lived or inhabited within the Pariſh, then to pay Tithes in Kind of thoſe Lands; and the only Queſtion was, whether this was a good *Modus*, or not.

2 P. Wms. 365. S. C. Fitzgibbon v. C.

It was inſiſted upon for the Parſon, that it was not a good *Modus*, for the Uncertainty of it; and for that was cited and relied on a Caſe in 1 *Lev.* 116. and the ſame Caſe 1 *Keb.* 602. where it is called a Leaping or a Dancing *Modus*, and there held not to be good for that Reaſon, for he may live in the Pariſh To-day, and remove out of it To-morrow; and how can the Rector, in a Caſe of ſuch Uncertainty, know how to make his Demands, when it is in the Power of the Pariſhioner to defraud him thereof, by going out, or coming into the Pariſh at his Pleaſure; and it is the Property of a *Modus*, that the Parſon may as well know how to demand it, as the Tenant to pay it; but here it is wholly in the Power of the Tenant to make it either a *Modus*, or payable in Kind, juſt as he pleaſes; and if Two ſhould agree thus; you ſhall live in my Houſe within the Pariſh, and I in yours out of the Pariſh, this will alter the Tithes for the Time; or if there ſhould be two joint Leſſees, and one ſhould live in the Pariſh, and the other out of the Pariſh, what is to be done in this Caſe?

That Tithes are of the Revenue of the Church, and any Thing done in Derogation thereof is to be taken ſtrictly.

That

That this *Modus* is to ariſe by the Act of the Party, and no *Modus* can ariſe by the Act of the Party, but what is for the Benefit of the Parſon; but here it is to ariſe by the Act of the Party, and yet is to the Prejudice of the Parſon; for the Difference between Tithes in Kind and this *Modus* are 10 *d. per Ann.* 1 *Rol. Abr.* 649.

This *Modus* tends to depopulate the Pariſh, ſo as there may be none to preach to; and all Cuſtoms founded in Fraud, are to be diſallowed, as 1 *Leon.* 99. *Cro. Eliz.* 446.

But on the other Side it was argued, that this was a good *Modus*, that as on the one Hand the Parſon is not to be defrauded of his Dues, ſo on the other Hand a *Modus* is not to be overturn'd on ſlight Grounds; that if they ſhould, Purchaſers might be affected, who come in under a Perſuaſion, that ſuch *Modus's* are all they are to pay; that it is not neceſſary to ſhew upon what particular Reaſon every *Modus* began, if it may be ſuppoſed to have a reaſonable Beginning; that this might begin when there were more Lands in the Pariſh than the Inhabitants could manure, and yet the Owners of thoſe Lands who lived elſewhere ſhould be obliged to pay 4 *d.* an Acre for them, though it is not neceſſary to ſhew the Reaſons on which they began.

That all *Modus's* may be ſaid to be an Invention to cheat the Parſon; and ſo in ſome Books they are called, as they are leſs than Tithes in Kind.

That as to its being a Leaping or Dancing *Modus*; ſo was that of the *Ciſtertians* and other Religious Orders, who paid Tithes of Lands *quamdiu in propriis Manibus excoluntur*; ſo Tithes are payable of Hay whilſt it continues Meadow; but if broken up, the Tithes thereof ceaſe till laid down again; and by *Godb.* 194. it appears there to be in the Power of the Occupier to chuſe, whether to pay his Tithes to the Parſon or Vicar, and yet held good.

That this is not ſuch a new Caſe as the other Side would have it imagined; for *Cro. Eliz.* 136. is a Caſe to this Purpoſe, tho' perhaps it might not occur at the Time the Caſe in 1 *Lev.* 1 *Keb.* came in Queſtion; and that it is not ſo eaſy a Matter to remove out of a Pariſh at Pleaſure; nor is it to be ſuppoſed any one would do it meerly to cheat the Parſon; and it was ſaid in general, that this *Modus* was as certain and permanent as moſt *Modus's*, or even as Tithes in Kind, which depend on the Choice of the Owner, whether he will plough his Land for Corn, or mow it for Hay; and here it is ſo far certain, that the Parſon is every Year ſecure of having either Tithes in Kind, or 4 *d. per* Acre; and if there is any Fraud proved, the Parſon will, notwithſtanding, recover Tithes in Kind, as 1 *Leon.* 99. and the Caſe afore cited in 1 *Lev.* and 1 *Keb.* was exploded, and denied to be Law; and the following Caſes in the Exchequer were quoted as Authorities in Point. *Aſhly* and *Pattiſon*, *Trin.* 12 *Car.* 1. *Aſhford* and *Newcomen*, *Trin.* 2. *Car.* 2. *Plaxton* and *Langſton*, *Mich.* 2 *W. & M. Reynolds* and *Appland* about two Years ago, and alſo *Moor* 909. *Hob. Cowper* and *Andrews*, and 2 *Brown Ent.* 595, 6.

The Court held it a good *Modus*, and ſaid, that all *Modus's* were at firſt upon an Agreement between the Parſon, Patron and Ordinary, by ſome Deed or Inſtrument in Writing, in the Nature of a Contract or Agreement; which, tho' now loſt, yet being run out into a Preſcription continues good; that here is no Uncertainty in the *Modus*, for the Parſon is always ſure to have the 4 *d. per* Acre, or elſe the

Tithes in Kind; nor is there any Burden on the Reſt of the Pariſhioners, by one or two going out of the Pariſh; and a Leaping or Dancing *Modus* is where the *Modus* itſelf varies, and is ſometimes more and ſometimes leſs, which is not the preſent Caſe; and decreed accordingly by the Lord *Chancellor*, aſſiſted by Mr. Juſtice *Reynolds* and Juſtice *Forteſcue*; my Lord *Chancellor* ſaid, the Caſe in *Keble* might perhaps be the Occaſion of this Suit. *Trin.* 1730. *Chapman* verſus Biſhop of *Lincoln*.

# CAP. LI.

# Trade and Merchandize.

(A) Of Principals and Factors.
(B) Of Partners in Trade.
(C) Of Policies of Inſurance, and Bottomry-Bonds.
(D) Of Part-Owners, Maſters, and Freighters of Ships.
(E) Of Cuſtoms amongſt Merchants relating to Accounts, and Notes given by them for Money.

## (A) Of Principals and Factors.

1. IF a Factor ſave the Cuſtoms of Goods due to a Foreign Prince, and ſuch Saving, by the Laws of that Country, is Felony in the Factor, and a Forfeiture of all the Freight, the Factor ſhall have the Benefit of the Cuſtoms ſaved, and not the Imployer, for he runs the Hazard wholly, and has the Poſſeſſion, which is a Right againſt all, except him that hath the very Right. *Trin.* 15 *Car.* 2. between *Smith* and *Oxenden*, 1 *Chan. Ca.* 25. Two Merchants having certified, that the Benefit of the Non-payment of the Cuſtoms belonged to the Factor; and Two others, that it belonged to the Imployer. 1 *Chan. Ca.* 76. *S. P.*

2. But if the Duties or Cuſtoms are due to our King, and the Factor ſaves them, and a Bill is brought by the Merchant againſt him, he ſhall be obliged to diſcover them; for this Cuſtom being founded in Fraud, is void. *Mich.* 15 *Car.* 2. between *Borr* and *Vandal*, 1 *Chan.* 30.

3. If *A.* imploys *B.* as his Factor to ſell Cloth, and *B.* ſells the Cloth on Credit, and before the Money is paid, *B.* dies indebted by Specialty more than his Aſſets will pay; this Money ſhall be paid to *A.* and not to the Adminiſtrator of *B.* as Part of his Aſſets, but thereout muſt be deducted what was due to *B.* for Commiſſion; for a Factor is in Nature only of a Truſtee for his Principal. *Hill.* 1708. between *Burdet* and *Willet*, 2 *Vern.* 638.

4. The Plaintiff being a Factor in *Blackwel-Hall*, advanced Money for his Principal, relying, as was ſurmiſed, on the Credit of Cloths reſting in his Hands, to re-imburſe himſelf; the Clothier died, his Adminiſtrator ſued at Law for the Cloth; and the Factor prayed, that he might be allowed, on Account, the Monies he advanced, but was diſmiſſed; for if there are Debts of a higher Nature, it would be a *Devaſtavit* in the Adminiſtrator, to pay or diſcount the Plaintiff's Debt. *Mich.* 1689. between *Chapman* and *Derby*, 2 *Vern.* 117. *Vid.* 1 *Vern.* 428.

## (B) Of Partners in Trade.

1. IF two Perſons ingage in a joint Undertaking in the Way of Trade, or enter into Copartnerſhip, it is not neceſſary to provide againſt Survivorſhip. 1 *Vern.* 217.

2. The Plaintiff's Husband (to whom ſhe is Adminiſtratrix) and the Defendant were Copartners for many Years in the Trade of a Druggiſt; the Plaintiff brought her Bill for a Diſcovery of the Eſtate, and her Proportion and Dividend thereof, *&c.* the Defendant anſwered; and it appearing that many Debts owing to the joint Trade ſtood out, it was moved, on Behalf of the Plaintiff, that an able Attorney might be appointed to ſue for and recover thoſe Debts, it being alledged in the Bill, that the Defendant carrying on a diſtinct Trade for himſelf with the Perſons that were Debtors to the joint Trade, to oblige them, he forbore to call in their Debts; and it was ordered accordingly, unleſs the Defendant, within a Week, would give Security to the Plaintiff to anſwer her Moiety of the Debts that were ſtanding out. *Hill.* 1682. between *Eſtwick* and *Conningsby*, 8 *Vern.* 118.

3. *A.* and *B.* were Partners, as Woollen-Drapers, *A.* received Money in the Shop of *J. S.* and gave a Note for it, ſigned by himſelf and Partner, *A.* and *B.* being both dead, and *A.* not leaving ſufficient Aſſets, it was held on a Bill brought by *J. S.* againſt the Executors of both the Partners, that this Note being given by one of the Partners it ſhould bind both; and that tho' at Law it binds only the Executor of the ſurviving Partner, yet in Equity the Creditor may follow the Eſtate of the other, though no Proof was made that this Money was brought into the Stock, or uſed in Trade. *Trin.* 1693. between *Lane* and *Williams*, 2 *Vern.* 277, 392.

4. *A. B.* and *C.* were Partners together in the Trade of a *Dry Salter*, *C.* imbezils and waſtes the Joint-Stock, contracts private

Debts, and becomes a Bankrupt; the Commiſſioners aſſign the Goods in Partnerſhip; *A.* and *B.* brought a Bill for an Account, and to have the Goods ſold to the beſt Advantage; and inſiſted, that out of the Produce of the Goods the Debts owing to the Joint Trade ought to be paid in the firſt place, and that out of *C.*'s Share Satisfaction ought to be made for what *C.* had waſted or imbeziled, and that the Aſſignees could be in no better Caſe than the Bankrupt himſelf, and were intitled only to what his third Part would amount unto clear, after Debts paid, and Deductions for his Imbezilments; and the Court ſeemed to be of that Opinion, but ſent it to a Maſter to take the Account and ſtate the Caſe. *Trin.* 1693. between *Richardſon* and *Goodwin* 293 *vid.* Title *Bankrupt.*

## (C) Of Policies of Inſurance and Bottomry-Bonds.

1. WHere a Policy of Inſurance is againſt Reſtraint of Princes, that extends not where the inſured ſhall navigate againſt the Law of Countries, or where there ſhall be a Seiſure for not paying Cuſtom or the like. 2 *Vern.* 176. *per Hutchins* Lord Commiſſioner.

2. The Defendant had lent 300 *l.* on a Bottomry-Bond, and afterwards inſured 450 *l.* on that Ship with the Plaintiff, for ſix *Guineas per Cent.* Premium, as intereſted for Money lent, *&c.* the Ship outlived the Time at which the Money was payable, and afterwards was loſt in the *Eaſt-Indies*; the Defendant recovered the Money on the Bottomry-Bond, and afterwards ſued the Inſurers upon their Policy, who brought their Bill to be relieved, for that the Money inſured by the Policy, was the Money lent upon the Bottomry, and that the Defendant was no otherwiſe intereſted in the Ship; and that the Money being paid, no Uſe ought to be made of the Policy; and the Court decreed the Policy to be delivered up. *Trin.* 1692. between * *Goddart* and *Garret.*

* 2 *Vern.* 269. *S. C.* Where it is held, that a Perſon having no Intereſt but his Bottomry-Bond cannot inſure; and that a Perſon who has no Intereſt in the Ship or Cargo cannot inſure; tho' the Policy was intereſted, or not, but Inſurances are for the Benefit of Traders and Merchants only; not that others unconcerned ſhould make unreaſonable Gain. But *Q.*

3. But where the Defendant lent the Plaintiff 250 *l.* on a Bottomry-Bond, and afterwards inſured on the ſame Ship, but the Inſurance was larger as to the Voyage, there being Liberty to go to other Ports and Places than what were contained in the Condition of the Bottomry-Bond; the Ship being loſt, the Defendant recovered the Money on the Policy of Inſurance, and alſo put the Bottomry-Bond in Suit; the Ship, though loſt, having deviated from the Voyage mentioned in the Bond; the Plaintiff brought his Bill pretending the Defendant ought not to have a double Satisfaction, to recover both on the Inſurance and alſo on the Bond, he having inſured only in Reſpect of the Money he had lent on the Bottomry, and had no other Intereſt in the Ship or Cargo, and therefore the Plaintiff would have had the Benefit of the Inſurance, paying the Premium; but the Court held, that the Defendant having paid the Premium was intitled to the Benefit of the Policy, and run the Riſque, whether the Ship was loſt, or not; and the Inſurers might as well pretend to have Aid of the Bottomry-Bond, and to diſcount the Money recovered thereon, as the

the Plaintiff to have the Money recovered on the Policy to eaſe the Bottomry-Bond. *Mich.* 1716. between *Harman* and *Vanhatton*, 2 *Vern.* 717.

4. On a Policy of Inſurance on Goods by Agreement, valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt; the Lord *Chancellor* ordered the Defendant to diſcover what Goods he put on board; for although the Defendant offered to renounce all Intereſt to the Inſurers, yet he referred it to a Maſter, to examine the Value of the Goods ſaved, and to deduct it out of the Value or Sum of 600 *l.* at which the Goods were valued by the Agreement. *Mich.* 1716. between *Le Pypre* and *Farr*, 2 *Vern.* 716.

5. The Plaintiff entered into a Penal Bond of Bottomry, to pay 40 *l. per* Month, for 50 *l.* the Ship was to go from *Holland* to the *Spaniſh* Iſlands, and ſo to return for *England*; but if ſhe periſhed, the Defendant was to loſe his 50 *l.* ſhe went accordingly to the *Spaniſh* Iſlands, took in *Moors* at *Africk*, and upon that Occaſion went to *Barbadoes*, and then periſhed at Sea; the Plaintiff being ſued on the Bond and Penalty ſought Relief, pretending that the Deviation was on Neceſſity; but his Bill was diſmiſſed, ſaving as to the Penalty. 2 *Chan. Ca.* 130. *vid.* 2 *Salk.* 444.

6. But where *J. S.* entered into a Bottomry-Bond, whereby he bound himſelf, in Conſideration of 400 *l.* as well to perform the Voyage within ſix Months, as at the ſix Months End to pay the 400 *l.* and 40 *l.* Premium, in Caſe the Veſſel arrived ſafe, and was not loſt in the Voyage; and it fell out, that *J. S.* never went the Voyage, whereby his Bond became forfeited; and he preferred a Bill to be relieved; and in Regard the Ship lay all along in the Port of *London*, and ſo the Defendant run no Hazard of loſing his Principal, the Lord *Keeper* thought fit to decree, that the Defendant ſhould loſe the Premium of 40 *l.* and be contented with his ordinary Intereſt. *Mich.* 1684. between *Deguilder* and *Depeiſter*, 1 *Vern.* 263.

7. A Part-Owner of a Ship borrowed Money of the Plaintiff upon a Bottomry-Bond, payable on the Return of the Ship from the Voyage ſhe was then going in the Service of the *Eaſt-India* Company, and the *Eaſt-India* Company broke up the Ship in the *Indies*; and the Owners brought their Action againſt the Company, and recovered Damages, but they did not amount to a full Satisfaction; and the Obligee brought his Bill to have his proportionable Satisfaction out of the Money recovered, but his Bill was diſmiſſed, and he left to recover as well as he could at Law; for a Court of Equity will never aſſiſt a Bottomry-Bond which carries an unreaſonable Intereſt. *Mich.* 1701. between *Dandy* and *Turner*.

## (D) Of Part-owners, Maſters and Freighters of Ships.

1. IF there are three Part-owners of a Ship, and one of them refuſes to fit out the Ship, and the others do it without his Conſent, and this Ship is loſt in the Voyage; yet he who refuſed to join ſhall bear his Proportion of the Loſs, for he would have been intitled to a Share of the Profits, if there had been any; but in Caſe the other two Part-owners had applied to the Court of *Admiralty* (as regularly they ought to have done) that Court would have made an Order,

that upon one Part-owner's Refuſing to navigate the Ship, the other Two ſhould have Liberty to do it alone, and ſhould not have been accountable to the Part-owner that refuſed to join for any Part of the Profits; and then, in Caſe the Ship had been loſt, the whole Loſs muſt have reſted on thoſe Two who ſet out the Ship. *Hill.* 1684. between *Strelly* and *Winſon*, 1 *Vern.* 297.

2. Where the major Part of the Part-owners of a Ship ſettle and agree an Account of the Profits of a Voyage, it ſhall conclude the Reſt. *Trin.* 1687. between *Robinſon* and *Thompſon*, 1 *Vern.* 465. *per Curiam.*

3. A Maſter of a Ship, without the Owner, treated with the Plaintiff, a Merchant, for the Freight of the Ship at eighty Tuns, and accordingly entred into a Charter-Party with him, to ſail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the Voyage, and there to unlade at a certain Rate *per* Tun; and for Performance the Maſter binds the Ship, Tackle, *&c.* valued at 300 *l.* the Maſter deviates and commits Barratry, by which the Merchant, in Effect, loſeth his Voyage and Goods; the Merchant had a Sentence againſt the Maſter and Ship in *Barcelona*, which was confirmed in a higher Court in *Spain*; and the Owner having brought Trover for the Ship, the Merchant exhibited his Bill to be relieved againſt this Action, and likewiſe another Action brought for Freight; and it was held by my Lord *Chancellor*, that the Charter-Party having valued the Ship at a certain Rate, the Owner is not liable further; and the Maſter is liable for Deviation and Barratry; for ſhould it be otherwiſe, Maſters would be Owners of all Mens Ships and Eſtates. 2 *Chan. Ca.* 238.

4. But where *A.* a Maſter of a Ship, of which the Defendants were Part-owners, bought ſeveral Goods of the Plaintiffs, as Beef, Biſket, Sails, Cordage; the Maſter failed, and a Bill was exhibited to compel the Defendants, the Part-owners, to pay; who inſiſted, that *A.* only was liable; and beſides, that he had Money from the Owners to pay the Plaintiff; and the Court held, that *A.* was but a Servant to the Owners, and where a Servant buys, the Maſter is liable; and if the Owners paid their Servant, yet if he paid not the Creditors, they muſt ſtand liable, and therefore decreed the Owners to pay the Plaintiffs their Debts in Proportion to their reſpective Shares and Intereſts in the Ship. *Hill.* 1709. between *Speering* and *Degrave*, 2 *Vern.* 643.

5. The Plaintiff, a Merchant in *London*, hired the Defendant's Ship to freight for a Voyage to *Bourdeaux*, at 3 *l.* 10 *s. per* Tun; it happened that an Imbargo was laid on all Merchant Ships for ſix Weeks; the Ship afterwards proceeds on her Voyage to *Bourdeaux*, and the Defendant not diſcovering what Agreement he had made with the Plaintiff in *England*, the Plaintiffs Factors and Correſpondents there agree to allow the Defendant 6 *l.* 10 *s. per* Tun, upon which latter Agreement the Defendant recovered at Law; a Bill being exhibited for Relief againſt this ſecond and under-hand Agreement, obtained, as was alledged, by Fraud, was diſmiſſed; for the Defendant was at Liberty to make a new Agreement, by Reaſon that the Performance of the firſt was obſtructed by the Imbargo after laid on all Merchant Ships. *Mich.* 1691. between *Draddy* and *Deacon*, 2 *Vern.* 242.

6. *A.* and *B.* Part-owners of the Ship *Falcon*, and *C.* the Maſter, by Charter-Party agree with the *Eaſt-India* Company, that the Ship ſhould be ready to ſail the 10th of *March*, 1683. and ſhould go from Port to Port, and to any Port or Place within the Limits of the *Eaſt-India* Company's Charter, as they ſhould direct, but was to be diſpatched back for *England*, on, or before the 24th of *Jan.* 1684. or ſo ſoon after as to ſave her *Moonſon* for *England* that Year, or in Default of her being diſpatched within the Time aforeſaid, the Owners were to pay four Months Demurrage, at 7 *l.* 10 *s. per Diem* for her *Moonſon* ſo loſt, and her Stay in *India* after the 20th of *January* 1684. with this further Clauſe, that the Company might detain the Ship in their Imployment in Trade or Warfare for any longer Time, not exceeding twelve Months after the 20th of *Jan.* 1684. after the Rate of 7 *l.* 10 *s.* and 6 *d. per Diem* Demurrage, until the Ship be diſpatched from the laſt lading Port, or Expiration of the twelve Months, which ſhall firſt happen; but after the twelve Months expired, the Ship to return to *England*, and the Company not to be liable for any further Demurrage, or any Damage that may accrue by her Detention after that Time; and the Company covenant, on the Ship's Arrival in *England*, to pay Freight for 300 Tun, and Demurrage from the 20th of *Jan.* 1684. until the Ship ſhould be diſpatched, for the Space of twelve Months after the ſaid 20th of *Jan.* 1684. And it was thereby provided, that until ſix Days after the Ship ſhall have returned to the Port of *London*, and made a right and full Diſcharge of all her Lading, the Company are not to pay, nor to be liable to pay any of the Sums of Money agreed on for Freight or Demurrage, or for detaining the Ship in *India*; it being the Intent of the Parties, that if the Ship ſhould be loſt either in her outward or homeward bound Voyage, nothing ſhould be paid by the Company for Freight or Demurrage; the Ship ſet Sail according to the Charter-Party, arrived in *India*, and was imployed by the Company in Trading from Port to Port for one Year and upward; and arrived in *India*, *Nov.* 23, 1684. and was to enter into Demurrage in four Months afterwards, which was the 23d of *March*, 1684. and the twelve Months after (during which Time the Company by their Charter-Party might detain her,) ended *March* 23, 1685. but the Ship was employed in the Company's Service, ſo that ſhe arrived not at *Surat* until 1686. and from thence was ordered to *Bombay*, where the Ship having been ſo long detained in thoſe Seas was ſurveyed, and found not ſufficient for a Voyage to *England*; and on *Septemb.* 24, 1686. The Seamen were diſcharged, and the Ship left there, the Company refuſing to pay any Thing for Freight or Demurrage; becauſe by the expreſs Proviſion of the Charter-Party, they were not to pay until ſix Days after the Ship's Arrival in *England*, and diſcharged of her Lading; and if they were to pay any Thing, yet they were to be charged with Demurrage until *March* 23, 1685. only, as is provided by the Charter-Party, and refuſed likewiſe to account for the Value of the Ship, or ſhew how that they had diſpoſed of her; the Part-owners brought a Bill for Relief; and the Court held, that tho' the Charter-Party was ſo penned, that nothing could be recovered at Law, yet the Plaintiffs having a juſt Demand ought to be relieved in Equity; and therefore decreed, that the Company ſhould account for what they made of the Ship, that they

ſhould pay Demurrage according to the Rate mentioned in the Charter-Party, and that they ſhould alſo be charged in Reſpect to Freight. *Hill.* 1690. between *Edwin & al'* and the *Eaſt-India* Company, 2 *Vern.* 210.

7. So in a Caſe, where by the Agreement there was no Freight to be paid for the outward-bound Cargo, but only a certain Rate *per* Tun for the homeward-bound Cargo; and when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with; and the Court decreed Payment of the Freight. Between *Weſtland* and *Robinſon*, 2 *Vern.* 212. cited.

8. So where the *Eaſt-India* Company took Bonds from the Mariners and Officers of a Ship, not to demand their Wages, unleſs the Ship returned to the Port of *London*; and the Ship arrived at a delivering Port, and was afterwards taken by the *French*; and it was held by my Lord Chief Juſt. *Holt*, in an Action tried by him, and likewiſe in *Chancery*, that the Seamen and Officers ſhould have their Wages to the Time of the Arrival of the Ship at the delivering Port. 2 *Vern.* 727.

## (E) Of Cuſtoms amongſt Merchants relating to Accounts and Notes given by them for Money.

1. IF one Merchant ſends another an Account ſtated, and he deſires him to write to him ſpeedily, and ſend his Exceptions, and the Account is reſted upon fourteen Years, it ſhall not afterwards be unravelled. 1 *Chan. Ca.* 127. *per Curiam.*

2. So where the Plaintiff's late Husband and the Defendant had Dealings together as Merchants, and ſhe exhibited a Bill for an Account; although it was agreed that the Length of Time was no Bar, yet the Plaintiff's Husband living many Years after the Trade and Dealings between them ceaſed, and after ſome Differences and Diſputes had ariſen between them, and acquieſcing to the Time of his Death, the Court diſmiſſed the Bill, and left the Plaintiff to recover at Law, if ſhe could. *Mich.* 1692. between *Sherman* and *Sherman*, 2 *Vern.* 276. and *per Hutchins* Lord *Commiſſioner*, amongſt Merchants it is looked upon as an Allowance of an Account current, if the Merchant that receives it does not object againſt it in a ſecond or third Poſt.

3. One *Agris*, a Goldſmith, having 150 *l.* of *Berkley*'s Money in his Hands, gives him a Note, whereby he promiſes to pay to him, or Order, on Demand, the Sum of 150 *l.* *Berkley* being indebted in the ſame Sum to the Plaintiff, delivers over that Note to the Plaintiff, but without making any Indorſement; Plaintiff preſently carries this Note, and likewiſe another Bill for 80 *l.* which he had upon one *Jackſon*, to Sir *Stephen Evans* and *Hales* Goldſmiths in *Lombard-ſtreet*, who were his Bankers or Caſhiers, and they gave him a Note to this Effect, *viz.* *Received of Mr.* Trowell (*the Plaintiff*) 230 l. *upon Account*; and on the Margin it was written thus, *Berkley* 150 l. *Jackſon* 80 l. and this Note was ſigned by Sir *Stephen* and *Hales*; they preſently ſent their Dunner to *Agris* to demand the Money, but he put them off from Time to Time for about thirteen or fourteen Days,

Days, though the Dunner had been ſeveral Times with him for the Money; and afterwards *Agris* fails; it was proved in the Cauſe, that *Agris* was ſolvent after the Note given by Sir *Stephen Evans*, and had paid above 800 *l.* to ſeveral People; upon *Agris*'s failing, the Plaintiff applies to the Defendants, Sir *Stephen Evans* and *Hales*, for Payment of the 150 *l.* Sir *Stephen* not thinking himſelf obliged to pay it, ſends the Plaintiff to *Berkley*, to whom the Note was firſt given, and he likewiſe refuſing Payment, the Plaintiff brought his Bill againſt them for a Satisfaction, and had a Decree at the *Rolls*, to charge Sir *Stephen Evans* and *Hales*; from which Decree they appealed to my Lord *Keeper*; and inſiſted they were not chargeable with this Money; that they took *Agris*'s Note only as Servants to the Plaintiff, and had ſeveral Times ſent their Dunner to demand the Money; that his promiſing them Payment was the Reaſon they did not give Notice, nor return the Note to the Plaintiff; that their Manner of giving Notes in *Lombard-ſtreet* was different from thoſe given by Goldſmiths at *Temple Bar*, yet in Subſtance they were the ſame, and amounted to no more than a Receipt for the two Notes from ſuch Perſons for ſo much Money, which, when they received, they promiſe to be accountable for; that this Bill was but in Nature of an Action of Account againſt them as Bailiffs, or Receivers of ſo much Money; and at Common Law, if ſuch Action had been brought, and upon the Trial it appeared they had received no Money, the Jury would have found againſt the Plaintiff; that the Reaſon that led Sir *Stephen* to give a Note in ſuch a Form, was a Caſe *Mich.* 2 *Ann.* between *Ward* and him, where the Caſe was, that the Plaintiff *Ward* being indebted to one *Fellows* in the Sum of 60 *l.* and having a Note from Sir *Stevan Evans* for 100 *l.* when *Fellows* came for his Money, *Ward* ſends a Servant with him to Sir *Stephen* with a Bill of 100 *l.* and ordered him to pay *Fellows* the 60 *l.* and indorſe it off the 100 *l.* Note; but Sir *Stephen* having a Note on one *Wallis* for 60 *l.* 10 *s.* gives that Note to *Fellows*, who pays him the 10 *s.* overplus, and goes away with the Note; the next Day *Wallis* fails; and upon an Action brought by *Ward* for the 100 *l.* the Court of *B. R.* was of Opinion, that the Delivery of the Note upon *Wallis* for 60 *l.* 10 *s.* was no Payment, and therefore *Ward* recovered the whole 100 *l.* and therefore Sir *Stephen* now only gave a Note for ſo much received on Account; and the Note in the Margin, ſhewing from whom it was due, made it plain, he only acknowledged the Receipt of ſuch Notes, but had no Deſign to charge himſelf with the Money till it was received. But my Lord *Keeper* was clear of Opinion, that the Note imported an Acknowledgment of ſo much Money received on the Plaintiff's Account; that the Entry on the Margin could at moſt only ſhew how it was received; and that the Note ſpoke itſelf, whatever the Forms and Meaning of ſuch Notes were, and therefore affirmed the Decree. *Mich.* 1710. between *Trowel* and Sir *Stephen Evans & al'.*

# CAP. LII.

## Trial.

### (A) In what Cases a new Trial may be granted, or the Venue changed by a Court of Equity.

1. THE Defendant's Wife had pawned her Husband's Plate to the Plaintiff for 110 *l.* for which the Defendant in Trover had recovered 115 *l.* Damages againſt the Plaintiff, and Judgment for it; the Plaintiff exhibited his Bill to be relieved againſt the Judgment, and to have a new Trial, ſuggeſting that the Defendant was privy to the Pawning, and received the 110 *l.* and the Proofs being read, it appeared that the Defendant had confeſſed ſo much; which, if it had been proved at the Trial, it was agreed the Defendant could not have recovered on the Trover; but there being no Proof now, that the Plaintiff at Law could not, by Reaſon of any Accident have his Witneſſes at the Trial, the Court would not, on any Neglect of his, grant a new Trial. *Hill.* 15 & 16 *Car.* 2. between *Curteſs* and *Smalridge*, 1 *Chan. Ca.* 23.

Bills for changing the *Venue*, or for granting a new Trial, are not reduced to any great Certainty; the Grounds for Relief, in the firſt Caſe, is Partiality in the Jurors; for though, by the Law, the Trial is to be by a Jury *de Vicineto*, yet if it appears that one of the Parties is ſo powerful in Intereſt in the County, and by that Means the other is in Danger of not having equal Juſtice done him, the Court will order the Trial in an indifferent County. 1 *Vern.* 439, 267. Grounds for a new Trial are, new Evidence diſcovered, which could not poſſibly be made Uſe of in the firſt; Perjury in the Witneſſes; Partiality in the Jurors, &c. all which muſt be made out to the Satisfaction of the Court. *Vide* 1 *Chan. Ca.* 65.

2. But where an Action was brought againſt an Adminiſtrator, who pleaded *Plene adminiſtravit*, and the Trial was brought down by *Proviſo*; and at the Trial, the Defendant being put to prove a Sum of 50 *l.* paid before the Plaintiff's Original, which not being provided to do, a Verdict was againſt him; yet after finding the Note, whereby his Witneſs was enabled to ſwear that Matter, on a Bill brought in Chancery, a new Trial was granted. *Hill.* 28 *Car.* 2. between *Hennell* and *Kelland.*

3. So where a Bill was exhibited for a new Trial, ſuggeſting the Plaintiff's Mark to the Bond was forged by one *Webb*, and on that Surprize the Defendant had recovered againſt him at Law, all the pretended Witneſſes to the Bond being dead; and a new Trial was granted. *Mich.* 1691. between *Coddrington* and *Webb*, 2 *Vern.* 240.

4. The Plaintiff's Wife had a Bond of 100 *l.* entered into, to her, by her Uncle, as a free Gift (as ſhe pretended) to be paid after his Death; and this Bill was brought to diſcover the Obligor's Aſſets, and to have a Satisfaction out of the real and equitable Aſſets. The Defendant inſiſted the Bond was forged, and therefore ought to have no Countenance or Aſſiſtance of a Court of Equity; and there were conſiderable Proofs of its being ſo; ſo it went to Law to try *factum vel non*, and found for the Bond; and then the Plaintiff came back to the Court, and had a Decree for a Satisfaction out of the Aſſets; for it was ſaid, that the Validity of the Bond having been ſo ſolemnly determined at Law, where it was only triable, the Plaintiff ought to have the common Juſtice and Aſſiſtance of this Court. The Defendant being diſſatisfied with this Decree petitioned for a Rehearing; and the Cauſe coming to be reheard, the former Decree was affirmed. The Defendant preſſed much for another Trial, but that was denied; for it was ſaid, if it were granted, and a Verdict againſt the Bond, the Plaintiff might, with as much Reaſon, ask another Trial, and ſo Matters would be made endleſs; beſides it would be much more unreaſonable to grant a new Trial in this Caſe, becauſe ſeveral of the Plaintiff's Witneſſes, who gave Evidence at the former Trial, were ſince dead; but the Defendant being ſtill more diſſatisfied appealed to the Houſe of Lords, who granted a new Trial, and it was found againſt the Bond. *Hill.* 1700. between *Wharton* and *Tilley*, 2 *Vern.* 378, 419. *S. C.*

5. An Iſſue was directed to be tried touching the Cuſtom of the Manor of —— which was found againſt the Plaintiff; and the Cauſe being heard on the Equity reſerved, it being alledged to be a Cauſe of Value, and concerning all the Copyholds in the Manor, a new Trial was directed upon Payment of Coſts. *Trin.* 1688. between *Edwin* and *Thomas*, 2 *Vern.* 75. 1 *Vern.* 489. *S. C. Vid.* 1 *Vern.* 298. where it is ſaid, that upon one Trial it was not proper to make a Decree to bind the Inheritance.

6. But where the Plaintiff, being a Purchaſer, came into Equity for Writings, and a Partition of Lands; the Defendant inſiſted there was an Intail, and the Plaintiff's Purchaſe not good; the Court, on the firſt Hearing, gave the Plaintiff a Year's Time to try his Title; an Ejectment was brought, and a Copy of the Deed of Intail was produced, but the Original loſt, and not proved to be executed; Verdict againſt the Intail; the Cauſe being ſet down on the Equity reſerved, the Defendant inſiſted, he ought not to be bound by one Trial in a Matter of Right of Inheritance, but the Court refuſed him any Relief, being only a Decree for a Partition; but the Reporter adds a *Quære tamen. Trin.* 1691. between *Bliman* and *Brown*, 2 *Vern.* 232.

7. A Factor buys Cheeſe for his Principal, and then breaks; and an Action is brought againſt the Principal, and a Recovery at Law; the Plaintiff here endeavoured in the Court of Law, to have got a new Trial, but was denied it; then he brought his Bill, and ſuggeſted for Equity, that before the Cheeſe bought, he had countermanded the Authority of the Factor, and that the Defendant had Notice of it; and that ſince the Trial the Plaintiff found that the Principal Witneſs, on whoſe Teſtimony the Recovery was had, was a Partner with the inſolvent Factor, (but that was not proved); another Suggeſtion was, that there could not be an indifferent Trial in *Suffolk*, for that almoſt all the Freeholders there were concerned in Intereſt,

and had declared they would never find against their Country-men; but the Court refused to grant a new Trial. *Paſch.* 1702. between *Tovey* and *Young*, 2 *Vern.* 437.

# CAP. LIII.

# Truſt and Truſtees.

(A) When a Truſt ſhall be ſaid to be raiſed.
(B) Of reſulting Truſts, or Truſts by Implication.
(C) What ſhall be a Truſt, and not an Uſe executed by the Statute.
(D) What Act of the Truſtee ſhall defeat the Truſt, or be a Breach of Truſt in him.
(E) What Act of the Truſtees jointly with Ceſtui que Truſt, or by Ceſtui que Truſt only, ſhall defeat the Truſt, or deſtroy contingent Remainders.
(F) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.
(G) Truſtees how to Account, and what Allowances to have.
(H) How far Truſtees are anſwerable for each other.

## (A) When a Truſt ſhall be ſaid to be raiſed.

1. IF a Man deviſes 1500 *l.* to *A.* and *B.* for ſuch Uſes as the Teſtator had declared to them, and by them not to be diſcloſed, and he diſcloſes the Truſt to *A.* who by Letter diſcloſes it to *B.* this ſhall be a Truſt, and the Letter is a good Declaration thereof, though either, or both the Truſtees be dead. *Trin.* 1689. between *Crooke* and *Brooking*, 2 *Vern.* 106.

When a Truſt is well raiſed for Payment of Debts, *vid.* Deviſe for Payment of Debts, Title *Deviſe*; Reſulting Truſts for the Benefit of an Heir, Title *Heir*; where Executors ſhall be Truſtees for the next of Kin, Title *Executors and Adminiſtrators.*

2. But

2. But if a Man deviſes 40 *l.* to be paid to his Couſin *J. S.* and by him to be diſpoſed of in ſuch Manner as the Teſtator ſhould by a private Note acquaint him with, and dies without having made any ſuch Appointment; this ſhall be a good Bequeſt to *J. S.* and ſhall not go to the Executors, from whom it was intended to have been given away. 1 *Chan. Ca.* 198.

3. If an Impropriator deviſes to one that ſerved the Cure, and to all that ſhould ſerve the Cure after him, all the Tithes and other Profits, *&c.* tho' the Curate is uncapable of Taking by this Deviſe in ſuch Manner, for Want of being incorporate, and having Succeſſion, yet the Heir of the Deviſee ſhall be ſeiſed in Truſt for the Curate for the Time being. 2 *Vent.* 349. decreed by *Finch* Lord *Chancellor.*

4. *A.* lent *B.* 100 *l.* and in the Note which was given for it, Mention was made that it ſhould be diſpoſed of as *A.* ſhould direct; on a Bill exhibited for it, the Court declared it was a *Depoſitum* or Truſt, and decreed Payment of it, tho' it was barred by the Statute of Limitations. 2 *Vent.* 345.

5. *A.* in Conſideration of 80 *l.* conveys an Eſtate abſolutely to *B.* and afterwards *A.* brings a Bill to redeem, and *B.* by Anſwer inſiſts that the Conveyance was abſolute, but confeſſes, that after the 80 *l.* paid, with Intereſt, it was to be in Truſt for the Wife and Children of *A.* and *A.* replies to the Anſwer; though there be no other Proof of the Truſt, yet it will be decreed for the Wife and Children. *Paſch.* 1693. between *Hampton* and *Spencer*, 2 *Vern.* 288-9.

6. So if *J. S.* makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother (by telling her that the Executorſhip would be troubleſome to her, *&c.*) to get *J. S.* to make a new Will, and name him Executor therein, he promiſing to be a Truſtee for the Mother, which is done accordingly, and in that Will there is but a ſmall Legacy given the Wife; this will be decreed a Truſt for the Wife on the Point of Fraud, notwithſtanding the Statute of *Frauds* and *Perjuries*. *Hill.* 1684. between *Thyn* and *Thyn*, 1 *Vern.* 296.

## (B) Of reſulting Truſts, or Truſts by Implication.

1. IF a Man purchaſes Lands in another's Name, and pays the Money, it will be a Truſt for him that payed the Money, tho' there be no Deed made, declaring the Truſt thereof; for the (*a*) Statute of Frauds and Perjuries extends not to Truſts raiſed by Operation of Law. 2 *Vent.* 361. 1 *Vern.* 366. *S. P.* admitted; but there ſaid, that the Proof muſt be very clear, that he paid the Purchaſe-money.

(*a*) By the 29 *Car.* 2. All Declarations and Creations of Truſts of Lands or Hereditaments muſt be in Writing, ſigned by the Party, or by his laſt Will in Writing, or elſe void; except Truſts ariſing by Implication of Law, and transferred or extinguiſhed by Act of Law, which ſhall be of the ſame Effect as if this Act had not been made.

2. If there are three Leſſees of a Church-Leaſe, and one of them ſurrenders the old Leaſe, and takes a new Leaſe in his own Name, it ſhall be a Truſt for all. *Mich.* 1684. between *Palmer* and *Young*, 1 *Vern.* 276. *per Curiam.*

3. *A.* and *B.* agreed together to take a Leaſe of a *Colliery* for leſs than three Years, for which they contracted at a certain Rent, but by the Agreement the Leaſe was taken in *A.*'s Name only; tho' at the Time of the Executing thereof, the Leſſor inſiſted, that *B.* ſhould be a joint Leſſee with *A.* and ſhould receive a Moiety of the Profits, and be anſwerable for a Moiety of the Rent, and refuſed to let it on any other Terms, and accordingly demanded and received a Moiety of the Rent from *B.* on a Bill brought by *B.* *A.* pleaded the Statute of Frauds and Perjuries, and that there was no Declaration of a Truſt in Writing; *B.* inſiſted that it was good, being a Leaſe for leſs than three Years; or if his Title was not good on that Account, yet it was good as a reſulting Truſt; as to the firſt, the Court held, that tho' a Leaſe for three Years may be good by Parol, yet when ſuch a Leaſe is made in Writing, the Truſt of that Leaſe cannot be declared by Parol; and as to the ſecond, ordered the Plea to ſtand for an Anſwer; (the Judge, who ſat in my Lord *Chancellor*'s Abſence, being in Doubt about it, tho' he inclined to over-rule the Plea.) *Mich.* 1682. between *Riddle* and *Emerſon*, 1 *Vern.* 108.

4. *A.*'s Father had executed a Grant of the next Avoidance of a Church to *B.* the Defendant's Father, who was a Clergyman, and a Perſon much intruſted and employed by him; and the Grantee knew nothing of the making of this Grant; and being examined in a Cauſe had depoſed, that he did not purchaſe it; and it was held, that this was a reſulting Truſt to the Grantor, there being no other Truſt declared. *Hill.* 1697. between the Duke of *Norfolk* and *Brown.*

5. But if the Mortgagee aſſigns over his Mortgage to *J. S.* and declares a Truſt thereof by Parol for *A.* and *B.* there being in this Caſe an expreſs Truſt declared, though by Parol only, it ſhall prevent a reſulting Truſt to the Aſſignor; for the Statute of *Frauds*, which ſaves reſulting Truſts, extends only to ſuch as were reſulting Truſts before the Statute; and a bare Declaration by Parol before the Act would prevent any reſulting Truſt. *Trin.* 1693. between Lady *Bellaſis* and *Compton*, 2 *Vern.* 294. but no Decree.

6. If a Father purchaſes Lands in the Name of his eldeſt Son, this ſhall be an Advancement for the Son, and not a Truſt for the Father, though the Father has been in Poſſeſſion of it, and has received the Rents and Profits thereof. *Hill.* 28 *Car.* 2. between Lord *Gray* and Lady *Gray*, 1 *Chan. Ca.* 296. 1 *Chan. Ca.* 27. *S. P.* 2 *Chan. Ca.* 231. *S. P.* and there ſaid to be the conſtant Rule.

7. So where the Lord of a Weſt-Country Manor (his Tenants refuſing to renew) made a Leaſe to his Daughter for ninety-nine Years, and afterwards ſold the Eſtate to *J. S.* who had Notice of the Leaſe, and took a collateral Security, that the Daughter ſhould releaſe within four Years after ſhe attained her Age of twenty-one Years; and though it was inſiſted, that this was a Truſt for the Father, and that it was the uſual Method, that Lords of Weſt-Country Manors took, when the Tenant in Poſſeſſion refuſed to renew; yet my Lord *Chancellor* held it no Truſt for the Father, but an Advancement for his Child; and that the Purchaſer having purchaſed with Notice of it, and taken a collateral Security, he muſt make the beſt of his Security. *Trin.* 1687. between *Jennings* and *Selleck*, 1 *Vern.* 467. decreed.

8. So if a Father purchaſes a Copyhold Tenement in the Name of his eldeſt Son, an Infant of about eleven Years old, and lays out 400 *l.* in Improvements, pays the Purchaſe-money, and all the Fines, and enjoys it during his Life (but having ſurrendered it to the Uſe of his Will) deviſes it to his Wife for Life, and after to his younger Children, who were otherwiſe unprovided for; and the eldeſt Son recovers in Ejectment; the Wife and Children cannot be relieved againſt it, for the Purchaſe ſhall be conſidered as an Advancement for the Son, and not a Truſt for the Father, tho' he enjoyed it during his Life; for the Son was but an Infant at the Time of the Purchaſe. *Paſch.* 1687. between *Mumma* and *Mumma*, 2 *Vern.* 19. 2 *Vern.* 28. *S. P.* decreed.

9. A Man bought Copyhold Lands of the Nature of Borough *Engliſh*, in the Name of his eldeſt Son, but there was no Declaration of Truſt in Writing; but the Plaintiff would have had it at a Truſt for the Father, who, as well as the eldeſt Son, were both dead; it was agreed the Father paid the Purchaſe-money, and many Witneſſes were examined on both Sides, and Acts of Ownerſhip, as Receipts of Rents, Repairs, *&c.* proved in both Father and Son; ſo that the Proofs as to that Matter, ſeemed to be pretty equal; but there being no Declaration in Writing, that it was a Truſt for the Father, the Court decreed it an Advancement for the Son; which was affirmed in the Houſe of Lords. *Trin.* 1701. between *Shales* and *Shales*.

10. So if a Father purchaſes Lands in his eldeſt Son's Name, and the Son is put into Poſſeſſion, who afterwards falls ſick, and in his Sickneſs the Father gets him to execute a Deed, declaring his Name was made uſe of only in Truſt for him; and the Son recovers, and continues in Poſſeſſion and marries; after his Death his Wife ſhall be endowed, notwithſtanding this Declaration of Truſt; and tho' the Father had got a Conveyance of the legal Eſtate from the younger Son; for this is a ſecret and fraudulent Deed of Truſt to deceive Creditors and Purchaſers. *Paſch.* 1702. between *Bateman* and *Bateman*, 2 *Vern.* 436.

11. If the Grandfather takes Bonds in the Name of his Grandchildren, the Father being dead, this ſhall be an Advancement for the Grandchildren, and not a Truſt for the Grandfather; for the Father being dead, the Children are under the immediate Care of the Grandfather. *Paſch.* 32 *Car.* 2. between *Ebrand* and *Dancer*, 2 *Chan. Ca.* 26.

## (C) What ſhall be a Truſt, and not an Uſe executed by the Statute.

1. IF Lands are deviſed to Truſtees and their Heirs, in Truſt for a Feme Covert, and that the Truſtees ſhall from Time to Time pay and diſpoſe of the Rents and Profits to the ſaid Feme Covert, or to ſuch Perſons as ſhe, whether Sole or Covert, ſhall appoint, and that her Husband ſhall have no Benefit thereof; and as to the Inheritance, in Truſt to ſuch Perſons as ſhe by Will, or other Writing under her Hand, ſhould appoint; and for Want of ſuch Appointment, to her and her Heirs, this ſhall be a Truſt, and not an

Uſe executed by the (*a*) Statute. *Mich.* 1685. between *Nevil* and *Saunders*, 1 *Vern.* 415.

(*a*) By the 27 H. 8. *c.* 10. it is provided that the Uſe and Poſſeſſion ſhall be always united, by declaring, that where any are or ſhall be ſeiſed of any Lands, &c. to the Uſe or Truſt of any other, by Reaſon of any Bargain or Sale, Feoffment, Fine, Recovery, Contract, Agreement, Will, or otherwiſe, by any Means whatſoever, *Ceſtui que Uſe*, or he to whoſe Uſe the Lands are ſettled in Fee-ſimple, Fee-tail, for Life, Years, or otherwiſe, or he who hath any Uſe in Reverſion, or Remainder, &c. ſhall be deemed to be in Poſſeſſion of the Land to all Intents and Purpoſes; and where one is ſeiſed of Lands to the Uſe or Intent, that another ſhall have an yearly Rent out of the ſame Lands, *Ceſtui que Uſe*, or he to whoſe Uſe the Rent is granted, ſhall be deemed in Poſſeſſion thereof, *viz.* of the Rent, and of like Eſtate, as he that had the Uſe. But notwithſtanding this Statute, there are three Ways of creating an Uſe or a Truſt, which ſtill remains as at Common Law, and is a Creature of the Court of Equity, and ſubject only to their Controul and Direction: 1*ſt*, Where a Man ſeiſed in Fee raiſes a Term for Years, and limits it in Truſt for *A.* &c. for this the Statute cannot execute, the Termor not being ſeiſed. 2*dly*, Where Lands are limited to the Uſe of *A.* in Truſt, to permit *B.* to receive the Rents and Profits; for the Statute can only execute the firſt Uſe. 3*dly*, Where Lands are limited to Truſtees to receive and pay over the Rents and Profits to ſuch and ſuch Perſons; for here the Lands muſt remain in them to anſwer theſe Purpoſes; and theſe Points were agreed to. *Trin.* 1700. between *Symſon* and *Turner*; *per Curiam.*

2. But where a Man deviſed the Rents and Profits of certain Lands to *T. B.* the Wife of *W. B.* during her natural Life, to be paid by his Executors, into her own Hands, without the Intermedling of her Husband, and after her Deceaſe he deviſed them to others; and it was held by *Rokeby* and *Eyre* Juſtices, that the Lands themſelves belonged to the Wife, againſt *Holt* Ch. Juſt. who held ſtrongly, that the Executors were only Truſtees for the Wife. Between *South* and *Allen*, 1 *Salk.* 228.

3. If Lands are deviſed to Truſtees and their Heirs, on Truſt to permit *A.* to take the Profits for his Life, and after the Truſtees to ſtand ſeiſed to the Uſe of the Heirs of the Body of *A.* *A.* has an Eſtate-tail executed in him; for this being a plain Truſt at Common Law, what is ſo, muſt be executed by the Statute, which mentions the Word *Truſt* as well as *Uſe*. Between *Broughton* and *Langley*, 2 *Salk.* 679. 1 *Lut.* 823. *S. C.* and *per Holt* Ch. Juſt. the ſame Point *cont.* in the Caſe of *Burchett* and *Durdant*, 2 *Vent.* 312. is not Law.

4. But where Lands were deviſed to Truſtees and their Heirs, in Truſt to pay ſeveral Legacies and Annuities, and to pay the Surplus of the Rents and Profits to a married Woman, during her Life, for her ſeparate Uſe, or as ſhe ſhould direct; and after her Death the Truſtees to ſtand ſeiſed to the Uſe of the Heirs of her Body, with Remainders over; and the Queſtion was, whether this Deviſe to pay the Surplus of the Rents and Profits to the Wife, was ſuch a Uſe or Truſt as was executed by the 27 *H.* 8. for if it was, then it was urged, that ſhe being Tenant for Life, the Limitation after to the Heirs of her Body being coupled with it, gave her an Eſtate-tail, according to *Shelley*'s Caſe, 1 *Co.* but if it did not, then the eldeſt Son was to take as a Purchaſer; and it was held by the Court, that ſhe had only a Truſt for Life, and conſequently the Heirs of her Body muſt take by Purchaſe; and the rather in this Caſe becauſe it was limited to the Heirs of her Body ſeverally and ſucceſſively, as they ſhould be in Seniority of Age and Priority of Birth, and the Heirs of their reſpective Bodies iſſuing; and a Difference was taken between this Caſe and that of *Broughton* and *Langley*, 2 *Salk.* for there it was to permit *A.* to receive the Rents and Profits for Life; but here it is a Truſt in the Truſtees, to pay over the Rents and Profits to ſuch and ſuch Perſons; and therefore the Eſtate muſt remain in them to anſwer theſe Truſts; otherwiſe ſhe muſt be the Truſtee, contrary to the

the expreſs Words of the Will. *Mich.* 1728. between *Jones* and the Lord *Say* and *Seal* decreed, and affirmed in the Houſe of Lords.

## (D) What Act of the Truſtee ſhall defeat the Truſt, or be a Breach of the Truſt in him.

1. IF *A.* ſeiſed in Fee, in Truſt for *B.* for full Conſideration conveys to *C.* who has Notice of the Truſt; and afterwards *C.* to ſtrengthen his own Eſtate, levies a Fine to *B.* the *Ceſtui que Truſt* is not bound to enter within five Years; for *C.* having purchaſed with Notice, notwithſtanding any Conſideration paid by him, is but (*a*) a Truſtee for *B.* and ſo the Eſtate not being diſplaced, the Fine cannot bar. 1 *Vern.* 149. agreed *per Curiam.*

(*a*) Truſts are ſo far regarded and ſupported in Equity, that regularly no Act of the Truſtee ſhall prejudice the *Ceſtui que Truſt*; for though a Purchaſer, for valuable Conſideration, without Notice, ſhall in no Caſe have his Title impeached in Equity; yet the Truſtee muſt, eſpecially in Equity, make good the Truſt; and my Lord *Hobart* is of Opinion, that an Action lies againſt him at Common Law; but if he purchaſes, with Notice, then he becomes the Truſtee himſelf, and ſhall be accountable for every Act of his, as the Truſtee was, and if either becomes inſolvent, the *Ceſtui que Truſt* has his Remedy againſt the other. The Truſtee of a Legacy dying before the Legacy is paid, ſhall not prejudice the Legatee; ſo if a Truſtee of Land die without Heir, though the Lord by Eſcheat will have the Land at Law, yet it will be ſubject to the Truſt in Equity. *Trin.* 1702. between *Eales* and *England*; ſo if *A.* puts out 100 *l.* at Intereſt in the Name of *B.* who after becomes a *Felo de ſe*, *A.* may be relieved againſt the King upon his Truſt, in Equity, upon the Statute of 33 *H.* 8. *cap.* 39. *vide Hard.* 176, 466, 395, 468. *Lane* 54.

2. So if an Executor, in Truſt for an Infant Reſiduary Legatee, renews a Leaſe, Part of the Teſtator's Perſonal Eſtate, in his own Name, and firſt mortgages it, and then aſſigns the Equity of Redemption to a Truſtee, to ſell for Payment of his own Debts, and his Truſtee ſells to one who had Notice of the Infant's Title, the Purchaſe will be ſet aſide. *Mich.* 1687. between *Walley* and *Walley*, 1 *Vern.* 484. decreed.

3. If a Truſtee ſells the Land to a Stranger, who has no Notice of the Truſt, and a Fine and Proclamation, and five Years paſs, and the Truſtee afterwards, for valuable Conſideration really paid, purchaſes theſe Lands again from the Vendee, the Truſtee, notwithſtanding the Fine, *&c.* ſhall ſtand ſeiſed as at firſt, and as if the Land had never been ſold. *Mich.* 34. *Car.* 2. between *Bovey* and *Smith*, 1 *Vern.* 60, 61, 144. 2 *Chan. Ca.* 124. *S. C.*

## (E) What Acts of the Truſtee, jointly with Ceſtui que Truſt, or by Ceſtui que Truſt only, ſhall defeat the Truſt, or deſtroy contingent Remainders.

1. IF Truſtees in a Settlement, to ſupport contingent Remainders, (*a*) join with the Tenant for Life in any Conveyance, to de-

(*a*) But if a Truſtee joins with a *Ceſtui que Truſt* in Tail in any Conveyance, to bar the Intail, this is no Breach of Truſt; for it is no more than what he may be compelled to, tho' the Truſtee himſelf might have barred ſuch Intail without his joining; and that not only by Fine or Recovery, but likewiſe by Feoffment, Bargain or Sale, Deviſe or Surrender (if the Intail be of a Copyhold, and there is no particular Cuſtom which requires a Common Recovery); for ſuch Intail is not within the Statute *de donis*, but remains as at Common Law; and being a Truſt is governable only by the Rules of Equity, and not by the Nicetics of the Law; and this ſeems to be ſupported not only by the latter, but by the far greater Number of Authorities; and in Caſes wherein the very Point it ſelf was debated, tho' there are *Obiter* Sayings and Opinions, which have made ſome Diſtinctions, and others which have flatly contradicted it. *Vid.* 1 *Chan. Ca.* 49, 213. 1 *Chan. Rep.* 68. 2 *Chan. Ca.* 78, 64. 1 *Vern.* 13, 440. 2 *Vent.* 350. 2 *Vern.* 133, 583, 702.

ſtroy the contingent Remainders before they come *in eſſe*; this is a plain Breach of Truſt; and whoever claims under ſuch Conveyance, having Notice of the Truſt, or by a voluntary Settlement ſhall be liable to make good the Eſtates. *Mich. 9 Ann.* between *Pye* and *Georges*, 2 *Salk.* 680.

2. But where a Settlement was made in Conſideration of a Marriage, and 3000*l.* Fortune, and for ſettling the Lands in Queſtion in the Name and Blood of the Husband; and the Lands were limited to Truſtees, in Truſt for the intended Husband for 99 Years, if he ſhould ſo long live, Remainder to Truſtees during his Life, to ſupport contingent Remainders; Remainder to the firſt and other Sons of that Marriage, Remainder to the Heir of the Body of the Husband, Remainder to the firſt and other Sons of that Marriage, Remainder to the right Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband; the Marriage took Effect, and the Husband and Wife and Truſtees to ſupport, *&c.* by Fine and other Conveyance ſettle theſe Lands on the Husband for ninety-nine Years, if he ſhould ſo long live; Remainder to Truſtees during his Life to ſupport contingent Remainders; Remainder to the Wife for her Life, for her Jointure, Remainder to the firſt and other Sons of that Marriage, Remainder over to ſeveral others; and then the Husband and Wife died without Iſſue; and the Plaintiff being Heir at Law to the Husband, brought his Bill to ſet aſide this ſecond Conveyance by the Truſtees, as being made in Breach of their Truſt; and inſiſted, that they were Truſtees, as well for the Support of this Remainder as of the Remainder to the firſt and other Sons, all being contingent Remainders; and that ſuch Conveyances ought to be ſet aſide, as has been the Practice of this Court, at leaſt the Opinion of the Court theſe twenty Years paſt. My Lord *Chancellor* held it to be ſo as to the firſt and other Sons, who came in, and were to be conſidered as Purchaſers under the Marriage-Settlement and Portion, and ſaid it would be dangerous for any Truſtees to make the Experiment, for that it was moſt certainly a Breach of Truſt; and if it ſhould ever come in Queſtion, he thought this Court would ſet aſide ſuch a Conveyance, not but that he ſaid the Caſe might poſſibly be ſo circumſtanced, as that this Court would not relieve againſt it; but where Relief is to be given, in ſuch Caſe it is only to thoſe who come in and claim as Purchaſers, as the firſt and other Sons, but all the Remainders after to the Heirs of the Body of the Husband, Remainder to his right Heirs, are meerly voluntary, and not to be (*b*) aided in this Court; and therefore diſmiſs'd the Bill. *Mich.* 1713. between *Tipping* and *Piggot*.

(*b*) *Vid.* 1 *Lev.* 237. *Jenkins* and *Keymis*, which ſeems *cont'*.

3. So if a Settlement on a Marriage-Treaty be made on the Husband for ninety-nine Years, if he live ſo long, Remainder to Truſtees to preſerve contingent Remainders; Remainder to the Heirs of the Body of the Husband by the Wife, Remainder to the Heirs of the Husband; and there is Iſſue two Sons and a Daughter; and the Wife being dead, the Husband and Truſtees join with the eldeſt Son in a Fine or Feoffment to *J. S.* this is a good Bar of the Truſt Eſtate, and the Truſtees joining is no Breach of Truſt, for they were Truſtees purely for the Tenant in Tail, and to preſerve his Eſtate, and not to ſtand in Oppoſition to him for the Sake of thoſe who were to come after him. *Mich.* 1717. between *Elice* and *Osborne*, 2 *Vern.* 754.

4. *J. S.* by a Marriage-Settlement was Tenant for ninety-nine Years, if he ſhould ſo long live, with Remainder to Truſtees and their Heirs during his Life, to ſupport contingent Remainders, with Remainder to his firſt and every other Son ſucceſſively in Tail Male, Remainder to Truſtees for 500 Years, in Truſt to raiſe Portions for Daughters, if there were no Iſſue Male, or that ſuch Iſſue Male died without Iſſue before Twenty-one; *J. S.* had Iſſue a Son, and being of Age and about to marry, he and his Father bring a Bill to have the Truſtees join in making an Eſtate, in order to ſuffer a Common Recovery, that he might be enabled to make a Settlement on his Marriage. And it was urged, that the Truſtees were only Truſtees for the Son, and ought to execute Eſtates as he ſhould direct, he having the Inheritance in him; and that the End of the Truſt was to hinder the Father from defeating the Son of the Eſtate. On the other Side it was urged, that theſe Truſtees were not only Truſtees for the eldeſt Son, but were deſigned as a Guard to the whole Settlement; that the Mother being living, there might be other Children, and for the Truſtees to join, would be a Breach of Truſt; and if there ſhould be Daughters, they would by this Means be entirely ſtript of their Portions; and tho' the Term for raiſing them was unskilfully drawn in putting it behind the Eſtate-tail to the Sons; yet this Court had ſet it ſometimes before thoſe Eſtates. There being a Daughter, in this Caſe, my Lord *Harcourt* directed, upon giving Security for the Daughter's Portion, that the Truſtees ſhould join in the Recovery. *Trin.* 11 *Ann.* between *Frewin* and *Charleton.*

5. By a Marriage-Settlement, Lands were ſettled on the Husband and Wife for Life, Remainder to Truſtees to preſerve contingent Remainders; Remainder to their firſt, and every other Son in Tail Male, and the Husband and Wife being married twelve Years, and having no Iſſue, and having contracted Debts, they bring a Bill, and pray that they may be enabled to ſell Part of the Lands for Payment of the Debts; and the Truſtee conſented, provided he might be indemnified; and though it was urged, that there were Precedents of like Caſes; yet my Lord *Chancellor* refuſed to make any ſuch Decree, ſaying, he had known People married near twenty Years without Iſſue, and after had Children; but at the Importunity of Counſel, gave them Time to attend him with Precedents. *Trin.* 1683. between *Davies* and *Weld*, 1 *Vern.* 181.

6. But where *A.* having mortgaged his Lands, and alſo confeſſed a Judgment, and he afterwards, on a Marriage-Treaty, ſettled the Lands thus incumbered to the Uſe of himſelf for Life, Remainder to Truſtees to ſupport contingent Remainders, Remainder to his Wife for Life, Remainder to his firſt and other Sons in Tail, Remainder to his own right Heirs, and having no Iſſue, articled to ſell the Lands to *J. S.* who brought a Bill for a ſpecifick Performance of the Agreement, and ſuggeſted that the Truſtees refuſed to join, and that the Mortgagee threatened to enter; and it was decreed, that the Truſtees ſhould join and be indemnified, the Eſtate being of an Equity of Redemption only; and there being no Iſſue (tho' the Husband and Wife were married ſix Years) and the Wife on her Examination in Court conſenting freely thereunto. *Mich.* 1693. between *Platt* and *Sprigg*, 2 *Vern.* 303. But *note*; thoſe Settlements can rarely be broke through, but by an Act of Parliament.

7. Sir *John Trevor*, late Maſter of the *Rolls*, being ſeiſed of the Eſtate in Queſtion, which was the antient Eſtate of the Family, and of the Value of 239 *l. per Ann.* or thereabouts, on his Marriage with *Jane Puleſton*, Widow, enters into Articles on the 23d of *October*, 1669. with the ſaid *Jane*, and with *William Salisbury* and Sir *Richard Loyd*, as her Truſtees, whereby, in Conſideration of the intended Marriage, and of the Love and Affection he had and bore to the ſaid *Jane*, and the Heirs Males of their two Bodies, he doth for himſelf, his Heirs, Executors and Aſſigns, covenant, promiſe and grant, with the ſaid Truſtees, their Heirs and Aſſigns, that he would, at his own Coſts and Charges, before the End of two Years next after the Date thereof, at the Requeſt of the ſaid Truſtees, their Heirs and Aſſigns, ſettle, convey and aſſure to the ſaid Truſtees and their Heirs, as they or their Heirs, or their Counſel ſhould direct and appoint the Lands in Queſtion, to the ſeveral Limitations and Uſes in theſe Preſents mentioned and expreſſed, and alſo in the ſaid Settlement and Conveyance, as ſhall be agreed on by the ſaid Sir *John Trevor*, *William Salisbury* and Sir *Richard Loyd*, and to no other Uſe or Uſes whatſoever, *viz.* To the Uſe of Sir *John Trevor* for Life, without Impeachment of Waſte, and after his Deceaſe, to the Uſe of the ſaid *Jane Puleſton* for her Life, and after her Deceaſe, to the Uſe of the Heirs Males of the Body of the ſaid Sir *John Trevor*, upon the Body of the ſaid *Jane Puleſton* to be begotten, and the Heirs Males of ſuch Heirs Males iſſuing; and for Default of ſuch Iſſue, to the Uſe of the right Heirs of Sir *John Trevor* for ever, with a Covenant from Sir *John Trevor* with the Truſtees and their Heirs, that the ſaid Premiſſes ſhall remain to the ſaid *Jane Puleſton*, during her natural Life, after the Death of the ſaid Sir *John Trevor*, free from all Incumbrances, and a Covenant in the Words following: And the ſaid Sir *John Trevor* doth further, for him and his Heirs, grant and agree to and with the ſaid *William Salisbury* and Sir *Richard Loyd*, their Heirs and Aſſigns, that in Caſe the Uſes and Limitations in theſe Preſents are not hereafter well and truly raiſed, according to the true Intent and Meaning of theſe Preſents, that then the ſaid Sir *John Trevor*, and his Heirs, ſhall ſtand and be ſeiſed of all and ſingular the ſaid Premiſſes, until ſuch Time that a farther Aſſurance of the ſaid Premiſſes be made, to ſuch Uſe and Uſes, Intents and Purpoſes, as herein before-mentioned, expreſſed and declared; and ſoon after the Marriage took Effect, and Sir *John* had Iſſue by the ſaid *Jane* the Plaintiff, his eldeſt Son, the Defendants three younger Sons, and two Daughters. Theſe Articles were laid by for ſeveral Years, and nothing farther done upon them; but in 1692. Sir *John Trevor* levies a Fine of thoſe Lands; and the two Truſtees being dead, without having ever requeſted a Settlement, the Plaintiff, ſome Time after this Fine, marries againſt his Father's Conſent, and by ſeveral other Acts of Weakneſs and Diſobedience, became ſo obnoxious to his Father, that 29 *Septemb.* 1699. Sir *John Trevor* makes a Deed, wherein he recites theſe Articles, that he had thereby agreed to ſettle and convey theſe Lands to the Uſe of himſelf for Life, Remainder to the ſaid *Dame Jane* his Wife, for Life, Remainder to the Heirs Males of his Body on the Body of the ſaid Dame *Jane* to be begotton; and reciting that his Son *Edward* (the Plaintiff) was very weak and diſordered in his Underſtanding, and that all Methods to improve him had been ineffectual; and alſo reciting,

ting, that he had married with a ſtrange Woman, and thereby brought Diſgrace on his Family, to the Ruin thereof; and that he was of a furious Spirit towards his Brothers and Siſters; therefore, and for ſeveral other Cauſes and Conſiderations, Sir *John* declares, that it was the Intent and Meaning of the ſaid Parties, at the Time of Levying the ſaid Fine, that the ſame ſhould be and enure to the Uſe of himſelf for Life, without Impeachment of Waſte, then to the Uſe of the ſaid Dame *Jane* for Life, Remainder to the Defendant *John Trevor*, his ſecond Son, and the Heirs Males of his Body, with like Remainders to *Arthur* and *Tudor Trevor*, his two youngeſt Sons, with a Remainder to his own right Heirs; and a *Proviſo*, that if any of his three younger Sons ſhould marry without his Conſent, that then he ſhould have Power to demiſe or leaſe the ſaid Premiſſes for the Term of 500 Years, reſerving Rent, or no Rent, as he thought fit, to any Perſon or Perſons he ſhould think fit; and the 16th of *October* next following, he makes a like Settlement of other Lands, of the Value of 630*l. per Ann.* and upwards, and the 20th of *May* 1717. dies Inteſtate, leaving a Perſonal Eſtate to the Value of about 40000*l.* and alſo a Real Eſtate in *Ireland*, of the Value of 750*l.* or thereabouts, being let out on Leaſes for Lives, and worth to be ſold, about 24000*l.* and alſo ſome new purchaſed Lands in *England*, of the Value of 300*l. per Annum* or thereabouts; and by his Death the now purchaſed Lands, and the Eſtate in *Ireland*, deſcended to the Plaintiff, his eldeſt Son, who alſo became intitled to his Share of the Perſonal Eſtate, which amounted to upwards of 9000*l.* After his Death *John Trevor* entered on the Lands ſettled on him, as aforeſaid, for which he being provided for beyond his Share of the Perſonal Eſtate, could have no Part thereof, by Reaſon of the Statute of Diſtributions; and this conſiderably augmented the Shares of *Edward* the eldeſt Son, and the other Brothers and Siſters; notwithſtanding which, the Plaintiff, the eldeſt Son, brought his Bill to have the Truſt performed, and a ſpecifick Execution of theſe Articles, and that the Lands compriſed in the Articles may be conveyed to him, and the Heirs Males of his Body, according to the Purport of the ſaid Articles, and to have a Diſcovery of the Deeds and Writings, and an Account of the Rents and Profits from the Time of his Father's Death. It appeared that theſe Articles had been thrown by for ſeveral Years as uſeleſs, and were, after Sir *John Trevor's* Death, found at the Bottom of an old Trunk; but the Plaintiff having gotten the ſame into his Cuſtody brought this Bill for a ſpecifick Performance thereof.

For the Defendants it was inſiſted, that though by the firſt Part of the Articles they ſeemed to be only executory, yet by the laſt Part, by the Covenant to ſtand ſeiſed, that they were actually and immediately executed; that he thereby covenanted to ſtand ſeiſed to the before-mentioned Uſes, till a Settlement was made thereof accordingly; that no ſuch Settlement having ever been made, the Uſes continued to be executed by Virtue of that Covenant; that by theſe Uſes he was plainly Tenant in Tail, then by the Fine had bound his Iſſue, and made himſelf Maſter of this Eſtate, which he might ſettle and diſpoſe of as he thought fit; that he was Tenant in Tail, appeared from this, that if a Settlement had been made purſuant to the very Words of the Articles, he had an Eſtate-tail in himſelf; that wherever the Anceſtor takes an Eſtate for Life, and afterwards in

the ſame Deed, a Limitation is made to the Heirs Males or Heirs Females, of his Body to be begotten ; that in ſuch Caſe the Heirs Males, or his Heirs Females take by Deſcent, and not by Purchaſe ; that this is a known and ſtanding Rule of Law which has neveryet been ſhaken; that the Limitation after to the Heirs Males of ſuch Heirs Males was Tautology, and of no Uſe ; that it was ſaying no more than what the Law would have ſaid without theſe Words ; and therefore, if there were two ſuch Limitations one after another, they would not impeach or controul the firſt Limitation ; and this appears clearly by *Shelley*'s Caſe, 1 *Co.* and in a Caſe of * *Legat* and *Shewell* in this Court, where the Judges of *C. B.* by Certificate under their Hands, gave their Opinions accordingly, that the Settlement being actually executed, the Law was open, and the Plaintiff had no Occaſion to come into this Court for a ſpecifick Execution of what was already executed ; that this was plain from the Covenant, that the Wife ſhould enjoy during her Life, free from Incumbrances, and this Covenant does not go to the whole Eſtate agreed to be ſettled, but only to the Eſtate for Life of the Wife ; that if the Iſſue were intended to take as Purchaſers, this Covenant would have been extended to the whole Eſtate, as the Iſſue under this Marriage Contract were Purchaſers of it, as well as the Wife ; but the Heirs Males of the Body of Sir *John Trevor* coming in only by Virtue of the Intail, it would have been vain and idle to have carried that Covenant beyond the Eſtate for Life of the Wife, becauſe it would only be a Covenant for himſelf, that the Clauſe without Impeachment of Waſte did not neceſſarily argue an Eſtate for Life in Sir *John Trevor* ; that it was for the Sake of the intervening Jointure to his Wife, which would have obſtructed that Power without expreſs Words ; and he might have been enjoined from Waſte in this Court, for the Preſervation of her Jointure, if he had not reſerved to himſelf an expreſs Liberty of committing Waſte ; that this Court was not bound in all Caſes to carry Articles executory (admitting theſe were ſo) into Execution ; that if the Nature and Circumſtances of the Caſe were ſuch as to make it unequitable and unconſcionable, this Court would never decree a ſpecifick Execution of Articles ; that in this Caſe it was unreaſonable to ask Aſſiſtance of this Court, when ſo much greater Compenſation was to come to the Plaintiff ; that by the Deſcent of ſo great a Real Eſtate, and the Acceſſion of ſo great a Share of the Perſonal Eſtate, the Plaintiff was abundantly recompenſed for the Value of the Eſtate in Queſtion ; that it was in Sir *John Trevor*'s Power to have prevented him of either, and his not doing it was equivalent to an expreſs Deviſe thereof to him, and therefore ought to be look'd on as a Satisfaction ; that in the Caſe of *Blandy Wigmore* in this Court, where the Husband, before Marriage, gave a Bond to leave his Wife worth 500 *l.* if ſhe ſurvived him, and he afterwards died Inteſtate, and her diſtributive Share came to above 500 *l.* this was adjudged a Satisfaction of the Bond ; that Sir *John Trevor* plainly took it he had a Power over this Eſtate ; that his Judgment was ſo well known, that he never would have attempted it, if he had not thought it clear ; that the Diſobedience and Behaviour of his Son, the Plaintiff, were ſuch, as put him under a Neceſſity of conſidering the Nature and Extent of his Power over this Eſtate ; and ſince he, who was ſo good a Judge in Caſes of this Nature,

* *Vid.* this Caſe, *infra* Letter (F.) Caſe 7. reported *cont'*.

ture, had diſpoſed of the Eſtate, this Court would preſume he had Power ſo to do, and that the Motives of his Proceeding herein were juſt and warrantable.

But notwithſtanding theſe Reaſons it was decreed for the Plaintiff. My Lord *Chancellor* ſaid, this Caſe ought to be conſidered now as if this Bill had been brought within two Years after the Making of the Articles; that if a Bill had been then brought, there could have been no Doubt but that a Settlement muſt have been decreed purſuant to the Intention of the Articles; that upon Articles the Caſe was ſtronger than on a Will; that Articles were only Minutes or Heads of the Agreement of the Parties, and ought to be ſo modelled when they come to be carried into Execution, as to make them effectual; that the Intention of the Parties was only to give Sir *John Trevor* an Eſtate for Life; that if it were otherwiſe, it would have been vain and ineffectual; and it would have been in his Power, aſſoon as the Articles were made, to have deſtroyed them; that then the Conſideration of Love and Affection which he had to *Jane* and the Heirs Males of their two Bodies, would have run thus, that he did, in Conſideration thereof, ſettle an Eſtate on himſelf, which he might give away from his Heirs Male whenever he thought fit; that this was much ſtronger, by Reaſon of the Limitation, and to the Heirs Males of ſuch Heirs Males iſſuing; that the Conſtruction contended for by the Defendant, would make theſe Words perfectly uſeleſs and idle; that he did indeed admit it to be ſo reported in *Shelley*'s Caſe, 1 *Co.* but he ſaid, 1*ſt*, That was not at all material to the Principal Point in Queſtion there. 2*dly*, That in *Anderſon*'s *Report* of that Caſe, nothing like it was taken Notice of, and he ſaid, that few or none of the Points reported by my Lord *Coke*, were the Reſolutions of the Court. 3*dly*, That the Reaſon of that Caſe was, for that if it had veſted in the eldeſt Son by Purchaſe, and that Heirs Males of the Body ſhould have only been a Deſcription of a Perſon, that then, if he had died without Iſſue, there had been (as was then held) an End of the Eſtate-tail, and none of the younger Sons could have ſucceeded to it; but this has been held otherwiſe ſince that Time, and a Judgment in Point, in *Carter*'s *Reports*, (as he remembered) that the Eſtate-tail ſhould go to all the Sons ſucceſſively, notwithſtanding its veſting in the eldeſt Son by Purchaſe; that he did not know how the Caſe of *Legatt* and *Shewell* was; but if it were as cited, he thought it not Law; that the Intention of the Articles was plain, to make the Iſſue of that Marriage Purchaſers; that they were wholly relative to a ſubſequent Settlement to be made; that the Agreement to ſettle to the Uſes therein, and alſo in the ſaid Settlement to be agreed upon, could only be intended ſuch other Uſes as were neceſſary to make the Settlement effectual; and that it could never be intended other Uſes inconſiſtent with, and repugnant to thoſe Articles; that if that had been their Intent, it had been in Effect but an Agreement with the Truſtees to ſettle thoſe Lands as he thought fit; that the other Uſes to be agreed upon, muſt not be ſuch as would overthrow the preſent Uſes, but ſuch as would eſtabliſh and ſupport them; that this could only be by a Limitation to Truſtees to ſupport the contingent Remainders; that this Limitation to the Heirs Male of his Body was in Effect but a Limitation to his firſt and other Sons; and if the Articles had been ſo penned, would not this Court have decreed a Li-

mitation to Truſtees to preſerve them; or if by Fine, or otherwiſe, they had been deſtroyed before they took Place, would not this Court have ſet them up again; that the Limitation to the Heirs Males of his Body, upon theſe Articles, was but a contingent Remainder, and yet ſuch as within the Intent of the Parties ought to be preſerved; that the Covenant to ſtand ſeiſed was until ſuch Time as the Uſes therein were well and truly raiſed, according to the true Intent and Meaning of the Articles; that if a Settlement had been made defective in any Particular, that would not have been final or concluſive; that a ſecond Settlement muſt have been made till the Uſes therein were well and truly raiſed; that this Covenant for ever ſubſiſted till ſuch Settlement were made; that he did not believe that it was Sir *John Trevor*'s Opinion, that he was abſolute Maſter of this Eſtate, and might diſpoſe of it as he thought fit; that if that had been his Opinion, he would have thought it ſufficient to have levied a Fine thereof, without tranſmitting down his Son to Poſterity with ſuch a Blemiſh; that the Reaſon of that could only be to diſcourage his Son from attempting to break into the Settlements he had made of this Eſtate; that if it were otherwiſe, he thought it no Imputation on Sir *John Trevor*'s Judgment; that the Provocations he might be under from his Son's Diſobedience and Misbehaviour might ſo far biaſs his Judgment, as to incline him to think he had Power over this Eſtate; that he would not look on theſe Settlements in 1699 as made by Sir *John Trevor*, Maſter of the *Rolls*, but as made by a Father provoked by the undutiful Behaviour of an eldeſt Son; that he hoped never to ſee the Time when this Court ſhould ſo far have Power as to judge what Behaviour of a Son ſhould amount to a Forfeiture of his Eſtate, and therefore thought, if the Settlement had been made, no Misbehaviour of the Son could amount to a Forfeiture of it; that as to the Eſtate deſcended on the eldeſt Son, this came to him by Accident; it was not given to him by his Father in Satisfaction of the Articles; and there may happen a Caſe where no Eſtate at all may deſcend to an eldeſt Son; and if a Father, upon ſuch Articles, ſhould have Power to defeat an eldeſt Son, and leave him no other Proviſion, it would be of dangerous Conſequence to eſtabliſh a Precedent of ſuch a Power; that though the eldeſt Son in this Caſe happened to be well provided for, ſo were the younger Sons too; and as they were ſufficiently provided for, there was the leſs Reaſon to take away this from the Eldeſt; that this Eſtate being ſpecifically agreed to be ſettled, it was a Truſt for the eldeſt Son, which he came here to have an Execution of, and not to have a Recompence or Satisfaction for it; that this Truſt paſſed with the Lands into whoſe Hands ſoever they came, and could not be defeated by any Act of the Father or the Truſtees; and therefore decreed a Conveyance to the Plaintiff and the Heirs Males of his Body, and an Account of the Profits from the Father's Death, and the Deeds and Writings to be delivered up. *Trin.* 1719. between *Trevor* and *Trevor*. This Decree was affirmed in the Houſe of Lords.

(F) When

## (F) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

1. A Husband, as Adminiſtrator to his Wife, obtained a Decree againſt the Truſtees to raiſe her Portion; but he being a younger Brother, having made no Settlement on her, and having a Son by her, the Money was decreed to be raiſed, and put out for his Benefit for Life, then to the Son for Life, and if he leave Iſſue, then for ſuch Iſſue; but if he dies without Iſſue, and the Father ſurvive, he to have it. *Paſch.* 1700. between *Wytham* and *Cawthorn*.

2. Upon a Marriage, Articles were entred into, whereby it was agreed, that the Wife's Portion ſhould be laid out in the Purchaſing of Lands, which ſhould be ſettled on the Husband and Wife for their Lives, and the Life of the longer Liver of them, and after to the Heirs of the Body of the Wife, by the Husband to be begotten; yet the Maſter of the *Rolls* decreed the Settlement to be to the firſt and other Sons, *&c.* ſo as the Husband and Wife might not have Power to bar the Iſſue. *Mich.* 1698. between *Jones* and *Langhton*.

3. So where an Eſtate was limited to *A.* and *B.* in Truſt for *C.* and the Heirs of his Body; *Proviſo*, that if he die without Iſſue, then in Truſt for *D.* for Life, with Remainders over; and *C.* brought his Bill to have the Truſtees make a Conveyance of the legal Eſtate to him, and that it might be to him in Fee, to prevent his ſuffering a Recovery; the Truſtees by Anſwer ſubmitted to the Court; but the other Remainder-men, who were Defendants, oppoſed the executing any legal Eſtate to *C.* becauſe he would then ſuffer a Recovery, and defeat the Intent of the Donor, which was, that it ſhould be preſerved for them, in Caſe *C.* had no Iſſue; they alledged, that *C.* had married improvidently and was extravagant, and would ſpend the Eſtate, and cited the Caſe at the End of *Twine's* Caſe, 3 *Co.* where, if an improvident Man makes a voluntary Settlement, to put it out of his Power to ſpend his Eſtate, this Settlement ſhall be ſupported even at Law; and therefore a Court of Equity will never help an extravagant Man to deſtroy ſuch a Settlement as this; and that in the Caſe of Sir *Fra. Gerrard*, the Lord *Chancellor Jefferies* had refuſed to decree the Truſtees for Sir *Francis* and the Heirs of his Body, with a Remainder to a Charity, to convey the legal Eſtate, ſo as to enable him to ſuffer a Recovery. On the other ſide it was ſaid, there was no Reaſon my Truſtee ſhould hold my Eſtate, whether I will, or no; and that if a Court of Equity did not decree a Conveyance in ſuch Caſe, it would be Eſtabliſhing a Perpetuity; and that the conſtant Courſe of this Court is, that when Money is given to be laid out in a Purchaſe to be ſettled in Tail, with Remainders over, the Court will decree the Money to him that was to be Tenant in Tail, if he deſire it, to prevent Circuity; but the Maſter of the *Rolls* decreed the Truſtees to execute a Conveyance to *C.* in Tail, but would not decree the Conveyance to be in Fee, though preſſed to it; and he ſaid there may be many Reaſons why a Court of Equity would not decree a Conveyance at all, in ſuch a

Caſe, ſometimes for a Politick Reaſon, as if it were to enable a Nobleman to ſuffer a Recovery, and leave the Honour bare, without Eſtate; or if the Party were a notorious Spendthrift, or when the Eſtate-tail was only by Implication, as he ſaid he took it in Sir *Fra. Gerrard*'s Caſe; and he thought it would be an ungodly Thing in the Truſtees to execute a Conveyance of the legal Eſtate in ſuch a Caſe as this at the Bar, without a Decree of the Court. *Hill.* 1701. between * *Saunders* and *Nevil. Note*; Though the Court would not decree a Conveyance in Sir *Fra. Gerrard*'s Caſe, yet he ſuffered a Recovery as *Ceſtui que Truſt* in Tail, which was held good, and the Eſtate enjoyed under it diſcharged of the Charity. *Vide* 2 *Vern.* 702.

* 2 *Vern.* 428. S. C.

4. But where on a Treaty of Marriage, Articles were entred into for ſettling Lands on the Husband for Life, Remainder to the Wife for Life, Remainder to Truſtees to preſerve contingent Remainders, with Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, with other Remainders over; and the Marriage took Effect; and a Settlement was made to the Huſband and Wife for their Lives ſucceſſively, Remainder to Truſtees to preſerve contingent Remainders, Remainder to the firſt Son of that Marriage, and the Heirs of the Body of ſuch firſt Son; and ſo to the Second and other Sons of that Marriage, and the Heirs of the Body of the Wife by the Husband to be begotten. They had Iſſue one Daughter only, then the Husband died; and the Wife married a ſecond Husband, and they both joined in a Fine and Recovery, by which the Daughter being barred of her Inheritance brought her Bill to carry the Articles into Execution; for that by the Settlement Care was taken of the Daughters purſuant to the Intention of the Articles; but no Care was taken of the Daughters in Regard the Limitation to the Heirs of the Body of the Mother by the firſt Husband made her Tenant in Tail general, and conſequently at Liberty to defeat her Daughters, as ſhe has now done by this Fine and Recovery, which was contrary to the Intention of the Articles, which were to make an effectual Proviſion for the Iſſue of that Marriage. But my Lord *Chancellor* ſaid, if no Settlement had been made, and you had come hither to have inforced the Making of one purſuant to the Articles; 'tis true, this Court would have taken Care that the Daughters ſhould likewiſe have been ſecured of the Proviſion intended them by the Articles, by limiting a Remainder to the Daughters and the Heirs of their Bodies to be begotten, on Failure of Sons; but here a Settlement being actually made, and accepted by the Parties, and in the Proviſion for the Sons, ſtricter than the Articles themſelves imported; and for the next Remainder, it being limited in the very Terms of the Articles, he could now make no Alteration in it; and though a Difference was offered, where the Settlement was made before Marriage, and where after; that where it was before, this Court would not interpoſe, as they might, where it was after Marriage; yet the Court had no Regard to this Diſtinction, but diſmiſs'd the Bill. *Paſch.* 1715. between *Burton* and *Haſtings*.

5. But where on a Treaty of Marriage between the Defendant and the Plaintiff *Joanna*, the Defendant entred into a Bond to the Plaintiff *Joſeph*, Father of the Plaintiff *Joanna*, with Condition to ſurrender certain Copyhold Lands to the Uſe of himſelf for Life, Re-

mainder to the Plaintiff *Joanna*, for Life, Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Husband; the Marriage took Effect; and a Bill was brought againſt the Husband to compel a Surrender purſuant to the Intent of this Bond; and the Husband making Default at the Hearing was decreed to ſurrender to the Uſe of himſelf for Life, Remainder to the Uſe of his Wife for Life, Remainder to the Uſe of their firſt and other Sons in Tail general ſucceſſively, with a Remainder to the Daughters of their two Bodies to be begotten in Tail general; and that in the mean Time, till ſuch Surrender was made, the Court declared that the Copyhold Land ſhould be held and enjoyed according to theſe Uſes. *Paſch.* 1716. between *Nandick* and *Wilkes*.

6. *W. B.* deviſed 300*l.* to her Daughter *M.* to be laid out by her Executrix in Lands, and ſettled to the only Uſe of her Daughter *M.* and her Children; and if ſhe died without Iſſue, the Lands to be equally divided between her Brothers and Siſters then living; the Plaintiff married *M.* the Legatee, and had Iſſue by her, but ſhe and her Child being both dead, and the Money not laid out in Land, the Bill was, that the Plaintiff might either have the Money laid out in Lands, and ſettled on him for Life, as being Tenant by Curteſy, or in Lieu of the Profits of the Lands might have the Intereſt of the Money during his Life; and it was held by the Court, that if it had been an immediate Deviſe of Land, *M.* the Daughter would have been by the Words in the Will Tenant in Tail, and conſequently the Husband would have been Tenant by the Curteſy; and in Caſe of a voluntary Deviſe, the Court muſt take it as they found it; although upon the like Words in Marriage-Articles it might be otherwiſe, where it appeared the Eſtate was intended to be preſerved for the Benefit of the Iſſue; and therefore decreed the Money to be conſidered as Lands, and the Plaintiff to have the Intereſt or Proceed thereof for his Life, as Tenant by the *Curteſy*. *Hill.* 1705. between *Sweetapple* and *Bindon*, 2 *Vern.* 536.

7. *A.* by Will bequeathed the Surplus of his Perſonal Eſtate to be laid out in a Purchaſe of Lands to be ſettled on *B.* his Nephew, for Life, and after his Deceaſe to the Heirs Males of the Body of the ſaid Nephew, and to the Heirs Males of the Body of every ſuch Heir Male, ſeverally and ſucceſſively one after another, as they ſhall be in Seniority of Age and Priority of Birth; every elder and the Heirs Males of his Body to be preferred before every younger; and for Want of ſuch Iſſue, to his Brother *C.* the Plaintiff, for his Life, *&c.* in the ſame Manner. *B.* the Nephew, brought a Bill to have an Execution of the Truſt (but *C.* the Plaintiff was no Party to the Suit) and had a Decree, that an Account ſhould be taken of the Aſſets; that the Eſtate ſhould be laid out in Land, and that to be ſettled by the Approbation of a Maſter, according to the Direction of the Will; after the Account was taken, *B.* petitioned the Court, ſuggeſting, that if the Money ſhould be laid out in a Purchaſe, he was to be made Tenant in Tail of the Land by the ſaid Will, and might immediately bar it; and therefore prayed, that no Purchaſe might be made, and obtained an Order to that Purpoſe, and had the greateſt Part of the Money paid him; but before the Reſt was paid died without Iſſue, having firſt made his Will, and ſubjected all his Real and Perſonal Eſtate to the Payment of his Debts; and this Bill was

brought by *C.* to have an Account of the Eſtate, and that it might be laid out in a Purchaſe for his Benefit; for that *B.* was not, by his Uncle's Will, to have been Tenant in Tail, as he alledged, and that the former Proceedings were colluſive, and he no Party to them, and ſo not bound by them. It was ſaid, it is plain, from the Frame of the Will, that the Teſtator's Meaning was, that his Nephew *B.* ſhould be only Tenant for Life, and not have Power to bar his Iſſue; and then a Court of Equity will decree it to be ſettled according to the Intent of the Teſtator; and the Caſe of *Leonard* and Earl of *Suſſex* was cited, and the common Caſe of Marriage-Articles, where, tho' they were ſo worded, as that if a Settlement were made in the preciſe Words of them, the Husband would be Tenant in Tail, yet this Court has decreed it to be ſettled on the Husband for Life only, and then upon the firſt and other Sons. On the other Side it was ſaid, if the latter Words in this Will ſignify any Thing, it is no more than what is included in the firſt, *& expreſſio eorum quæ tacite inſunt nihil operatur*; that this therefore is an equitable Eſtate, and may be barred by Deed, *&c.* Lord *Keeper*: There having been a Decree already in this Caſe, it muſt depend on what it is at Law; and I am inclined to think the Judges there may take it to be an Eſtate-tail; if it were *res integra*, I think the Court had better in ſuch Caſes decree the Truſt to be executed according to the (*a*) Letter, and let the other take what legal Advantages he can; but that has gone too far to be diſturbed now the Thing is done and not open to me; and there may be a Parity of Reaſon between a conſtructive Tenancy in Tail and an expreſs one; and Parity of Reaſon to have an equitable Tail bound by Decree (not by Deed) as a real one by Recovery, where Setttlements are agreed to be made upon valuable Conſiderations, this Court will aid in artificial Words, and make an artificial Settlement; but I never knew it done for a bare Volunteer; the Doubt in *Shelley*'s Caſe, 1 *Co.* aroſe about the Word *Heirs*; but, as I ſaid before, this muſt depend on what it is at Law; therefore let a Caſe be made, and I will deſire the Opinion of the Judges of the *C. B.* upon it. *Paſch.* 1706. between *Legatt* and *Shewell*, 2 *Vern.* 551. *S. C. Note*; Afterwards three of the Judges certified their Opinion, that *B.* the Nephew had but an Eſtate-tail,

(*a*) It is now conſtantly held in Chancery, that if Lands are veſted in Truſtees to the Uſe of one and the Heirs of his Body, with Remainder over, that the Truſtees are not to convey a Fee, but an Eſtate-tail, though he will have Power to bar the Intail,

when the Conveyance is made to him, and it would avoid Circuity; ſo if a Sum of Money be appointed to be laid out in a Purchaſe, and the Lands to be ſettled in Tail, the Purchaſe and Settlement ſhall be made accordingly, and not the Money paid the Party; for the Remainder-man has a Chance for the Eſtate, in Caſe the Tenant in Tail in Poſſeſſion die without Iſſue before any Recovery ſuffered, which he may omit through Ignorance or Forgetfulneſs, or he may be prevented by Death before he has compleated it.

8. *Henry Collingwood* the Plaintiff's Brother, having married *Catherine Moreton*, the only Daughter and Heir at Law of *George Moreton*, in order to pay off ſeveral Debts which were charged on his own Eſtate, and likewiſe ſeveral Debts which were charged on his Wife's Eſtate, both by her Father and her two Brothers, who were dead, and alſo by herſelf, by Leaſe and Releaſe and Fine, in 1709. *Henry* and his Wife conveyed the Wife's Eſtate to Truſtees and their Heirs, in Truſt to ſell and diſpoſe thereof, and of every or any Part thereof, for Payment of the ſaid Debts, with Intereſt and Charges; and if any Money ſhall remain in the Truſtees Hands, they were to pay it to the ſaid *Henry* and *Catharine* his Wife, as the ſaid *Henry* and *Catharine* ſhould, by any Writing duly executed before

fore three or more Witneſſes, direct or appoint; the Truſtees ſold all the Lands except two Farms, and paid all the Debts; *Catharine* died in the Life-time of her Husband, leaving Iſſue only a Daughter, who was married to the Defendant; *Henry Collingwood*, by his Will 4th of *Jan.* 1710. deviſes thus: I give to my dear Brother *George Collingwood*, (the Plaintiff) all my Lands and Houſes, with the Appurtenances lying and being in *A.* to the Uſe of him and his Heirs, and dies, leaving no other Lands in *A.* but the two Farms above-mentioned, which were his Wife's, and remained unſold after his Death; the Defendants entred on theſe two Farms, claiming them as the Inheritance of the Mother, and that from her they deſcended to the Defendant her Daughter; and they inſiſted, that *Henry* had no Power under the Settlement to diſpoſe of the unſold Farms, but that the ſame, or the Truſt thereof, deſcended to the Defendant; upon which this Bill was brought for a Diſcovery of the Settlement and Fine, and to have a Conveyance from the Truſtees. And it was inſiſted on for the Plaintiff, that it appeared by the Settlement, that all the Eſtate was intended to be ſold; in which Caſe *Henry* ſurviving would have been intitled to what was unſold, as he would have been to the Purchaſe-money, if ſold, and conſequently had a Power of diſpoſing thereof; and that the Truſtees, after the Truſts performed, ſtood ſeiſed in Truſt for *Henry* and his Heirs, who had by his Will well deviſed the ſame to the Plaintiff. The Defendants inſiſted, that the Reaſon of ſubjecting the whole Eſtate to be ſold for the Payment of Debts, was, that there might be a ſufficient Fund for that Porpoſe, not to empower the Truſtees to ſell the Whole for the Sake only of turning it into Money; when it appeared that Part thereof would be ſufficient; that they had accordingly done there Duty, in ſelling as much as was neceſſary; and for what remained unſold, it was a reſulting Truſt for the Defendant, the Heir at Law, and that as it was the Wife's Inheritance, it was not ſubject to the Husband's Debts, but at her Pleaſure; and when ſhe has been ſo kind as to let in them on her own Eſtate, it would be unreaſonable to carry it further, and take away her whole Eſtate from her, only to enable her Husband to give it away, and even diſinherit, as he has done in this Caſe, both his own and his Wife's only Daughter and Heir at Law; and in this Caſe there was an Overplus in Money, even of what was actually ſold, which the Husband gave away to a Woman he had Children by, and gave his own Daughter but one *Guinea*. But my Lord Chancellor was of Opinion for the Plaintiff, and decreed a Conveyance to be made to him by the Truſtees of the unſold Eſtate, and ſaid, that the Truſtees having Power to ſell the Whole, it muſt be conſidered in Equity as if actually ſold; in which Caſe the Money would have gone to the Husband, and ſo muſt the Land too, elſe it would be in the Power of the Truſtees to make it Land, or make it Money at their Pleaſure, and ſo to give it to whom they ſhould think fit; but the Intention appearing to be, that the Reſidue ſhould go to the Husband and Wife, and the Survivor of them, it muſt go accordingly, whether Land or Money. *Paſch.* 1727. between *Collingwood* and *Wallis*.

9. So where *A.* having five Nieces, his Coheirs at Law, who had each of them ſeveral Children, deviſed a very conſiderable Eſtate to Truſtees and their Heirs, to be ſold, and to put the Money ariſing by ſuch Sale, into five equal Parts and Shares, and out of each 5th

Part or Share, to pay 100 *l.* a-piece to the ſeveral younger Children of each of his five Nieces, and the Reſidue of the Money of each 5th Part to be paid to ſuch of his ſaid five Nieces as ſhould be then living; and in Caſe of their Deaths, then their Shares to be equally divided amongſt their younger Children, which ſhould be alive at the Time the Dividends were, or ought to be made; great Part of this Eſtate was ſold many Years ſince, and the 1000 *l.* a-piece to the ſeveral Children of the five Nieces had been paid, after which the Nieces themſelves being intitled to the Remainder of the Truſt Eſtate, choſe not to have it ſold, but continued to receive the Rents and Profits thereof in five equal Shares for ſeveral Years; and they being all now dead, the eldeſt Son of each of them claimed it as a reſulting Truſt for their reſpective Mothers, and that from them it deſcended to their eldeſt Sons as Heirs at Law; and the rather, for that all the Purpoſes, for which the Truſt was created, being ſatisfied, their Mothers might in their Life-times have compelled the Truſtees to have executed Conveyances to them reſpectively of the unſold Eſtate; and they, as their Heirs at Law, ſtood in their Place, and had the ſame Right; and that otherwiſe it would be in the Truſtees Power, by delaying or haſtening the Sale, to give the Surplus to whom they pleaſed; and that it was now two Years ago ſince the Truſt was created, and yet great Part of the Eſtate remained ſtill unſold. But the Court directed the Reſt of the Eſtate to be ſold, and the Money to be divided among the younger Children of each Niece, according to the Will, as it would have been if the Nieces had died before the 1000 *l.* a-piece to their younger Children had been paid, or before ſufficient of the Eſtate could have been ſold for the raiſing thereof; the Teſtator plainly intending that the younger Children of each Niece, not their eldeſt Sons, or Heirs at Law, ſhould ſtand in their Mother's Place; and greatly blamed the Truſtees for having ſo long delayed the Sale. *Paſch.* 1727. between *Davers* and *Folkes*.

## (G) Truſtees, how to Account, and what Allowances to have.

1. THE Defendant was Truſtee to the Plaintiff an Infant, who received for him 40 *l.* in Gold; the Truſtee was robbed by his own Servant, who lived with him in the Houſe, of 200 *l.* and this 40 *l.* which laſt Sum was only proved by his own; yet my Lord *Chancellor* allowed it on Account, for he was but to keep it as his Own. *Hill.* 30 *Car.* 2. between *Morley* and *Morley*, 2 *Chan. Ca.* 2.

2. A Truſtee ſhall not be charged with imaginary Values, but only as Bailiff, tho' very ſupine Negligence might indeed, in ſome Caſes, charge a Truſtee with more than he had received; but the Proof thereof muſt be very ſtrong; and it is a Hardſhip on him, that he is allowed nothing for his Pains. 1 *Vern.* 144. and ſaid, that it was a hard Rule to charge a Truſtee with what he had made, or might have made, without his wilful Default; but the Reaſon was, becauſe the Court could never yet find where elſe to fix the Meaſure.

3. If a Truſtee ſues for the Truſt Eſtate, and obtains a Decree with Coſts of Courſe, and the Coſts taxed him are ſhort of his Real Coſts; and the *Ceſtui que Truſt* exhibits a Bill for an Account of the Truſt Eſtate; the Truſtee, in his Diſburſements, ſhall be allowed

the full and neceſſary Coſts, and ſhall not be concluded by the Coſts taxed. *Hill.* 24 *Car.* 2. between *Anand* and *Bradbourne*, 2 *Chan. Ca.* 138.

4. If two Eſtates are conveyed to a Truſtee for Payment of ſeveral and diſtinct Debts, and the Heir at Law brings a Bill for an Account, and afterwards prays that the Bill may be diſmiſſed as to one of the Eſtates, yet an Account ſhall be taken of both Eſtates. 1 *Vern.* 28.

5. *A.* deviſed 100 *l.* a-piece to four Children, payable at Twenty-one, or Marriage, with Maintenance not exceeding the Intereſt in the Mean Time; *B.* was appointed Truſtee of a Truſt Eſtate, to raiſe and pay the Legacies as aforeſaid; and he paid 20 *l.* in placing out one of the Children Apprentice, who died before his Age of Twenty-one Years; and the Court held that the 20 *l.* was laid out, and that the Truſtee ſhould be allowed it. 2 *Vern.* 137.

6. But if a Truſtee for the Payment of Childrens Portions pays one of them his full Share, and the Truſt Eſtate decays, he ſhall not be allowed ſuch Payment, 2 *Chan. Ca.* 132. *per* Lord *Keeper*; and it was urged, that though the Appointment was to pay one in the firſt place, *&c.* yet it would not be good, as it did not denote Preference in the Quantity of the Sum to be paid; but my Lord *Keeper* was of another Opinion as to this Point; but it was clearly agreed, that a ſpecifick Legatee may be paid in the firſt place; but for this *vid.* Title *Legacy.*

7. Although an Executor or Truſtee is not impowered or directed to place out Money at Intereſt; yet if he makes Intereſt, he ſhall be accountable for it. *Paſch.* 1706. between *Lee* and *Lee*, 2 *Vern.* 548. decreed accordingly.

But afterwards a Difference was taken by my Lord *Macclesfield*, *viz.* that if an Executor or Truſtee of Money places it out in the Funds or on other Security, whereby he gains conſiderably, that he ſhall have the whole Benefit thereof to himſelf, in Reſpect of the Hazard he run of being a conſiderable Loſer thereby, which he muſt have born; but if ſuch Truſtee or Executor were an inſolvent Perſon at the Time of placing out ſuch Truſt-money, there the *Ceſtui que Truſt* ſhall have the whole Benefit gained thereby, as he only could have born the Loſs thereof, if any had happened, the Truſtee or Executor, by Reaſon of his Inſolvency, being incapable thereof, and conſequently running no Hazard at all. *Mich.* 1719. between *Bromfield* and *Wytherly.*

## (H) How far Truſtees are anſwerable for each other.

1. IF two Truſtees for the Sale of a Truſt Eſtate join in a Conveyance of it to a Purchaſer, and each of them receives 1000 *l.* and they likewiſe join in Receipts for the Conſideration-money, tho' afterwards one of them becomes Inſolvent, yet the other is not liable to the Money received by him; for their joining (without which the Eſtate could not be ſold) was abſolutely neceſſary. *Cro. Car.* 312. 2 *Vern.* 515. *S. P.* 1 *Salk.* 318. *S. P.*

2. But if two Executors join in the Sale of the Goods, &c. of the Teſtator, they ſhall be both chargeable, tho' one of them only received the Money, for there was no Neceſſity for their Joining. 2 *Vern.* 570. 1 *Salk.* 318.

# CAP. LIV.

# Waſte.

## (A) Waſte, in what Caſes reſtrained in Equity.

1. IF there be Leſſee for Life, Remainder for Life, the Reverſion or Remainder in Fee, and the Leſſee in Poſſeſſion waſtes the Lands, tho' he is not puniſhable for Waſte by the (*a*) Common Law; yet he ſhall be reſtrained in Chancery, for this is a particular Miſchief. 1 *Rol. Abr.* 377. *Moor* 554. *S. P.* 1 *Vern.* 23. *S. P.*

(*a*) That ſuch Leſſee is not puniſhable by the Common Law, during the Continuance of the Remainder, tho' after its Determination he is. *Vid. Co. Lit.* 54. 2 *Inſt.* 301. 5 *Rep.* 76.

2. But if ſuch Leſſee has in his Leaſe an expreſs Clauſe of *without Impeachment of Waſte*, he ſhall not be (*b*) injoined in Equity. 1 *Vern.* 23.

(*b*) Although a Court of Equity will not aſſiſt a Forfeiture, yet the Tenant in Poſſeſſion ſhall be reſtrained in Equity from committing Waſte in all Caſes, in which Waſte is puniſhable by Law; and for this Purpoſe an Injunction will be granted before the Bill is filed; alſo an Injunction will be granted to ſtay Waſte in Behalf of an Infant *in Ventre ſa mere*; Equity will likewiſe, in ſome particular Caſes, reſtrain the Tenant from committing Waſte, where it is diſpuniſhable by Law, either by the Nature of his Eſtate, or by expreſs Grant of *without Impeachment of Waſte*; but where by the Agreement of the Parties, the Leaſe is made without Impeachment of Waſte, Equity will not reſtrain the Leſſee from cutting Timber, Plowing, opening Mines, &c. tho' ſuch Leſſee ſhall be reſtrained from pulling down Houſes, defacing Seats, &c. *Hard.* 96. 1 *Chan. Rep.* 13, 14, 106, 116. 2 *Vern.* 392, 711. 1 *Salk.* 161. 2 *Chan. Ca.* 32. 2 *Chan. Rep.* 94.

3. *A.* on the Marriage of his eldeſt Son, in Conſideration of 10000 *l.* Portion, ſettled (*inter alia*) *Raby Caſtle* on himſelf for Life, without Impeachment of Waſte, Remainder to his Son for Life, and to his firſt and other Sons in Tail Male; afterwards, having taken ſome Diſpleaſure to his Son, he got 200 Workmen together, and of a ſudden ſtript the Caſtle of the Lead, Iron, Glaſs, Doors and Boards, &c. to the Value of 3000 *l.* And the Court, on the Son's filing his Bill, granted

ed an Injunction to ſtay Committing of Waſte in pulling down the Caſtle, and upon Hearing the Cauſe decreed not only the Injunction to continue, but that the Caſtle ſhould be repaired, and put in the ſame Condition it was in; and for that Purpoſe a Commiſſion was to iſſue to aſcertain what ought to be repaired, and a Maſter to ſee it done at the Charge and Expence of the Father, and the Son to have his Coſts. *Hill.* 1716. between *Vane* and Lord *Bernard*, 2 *Vern.* 738, 739. 1 *Salk.* 161. *S. C.*

4. If *A.* is Tenant for Life, Remainder to *B.* for Life, Remainder to the firſt and other Sons of *B.* in Tail Male, Remainder to *B.* in Tail, *&c.* and *B.* (before the Birth of any Son) brings a Bill againſt *A.* to ſtay Waſte, and *A.* demurs to this Bill, becauſe the Plaintiff had no Right to the Trees, and none that had the Inheritance was Party; yet the Demurrer will be over-ruled, becauſe Waſte is to the Damage of the Publick, and *B.* is to take Care of the Inheritance for his Children, if he has any, and has a particular Intereſt himſelf, in Caſe he comes to the Eſtate. *Trin.* 1700. between *Dayrell* and *Champneſs*.

5. On a Motion for an Injunction to ſtay a Jointreſs, Tenant in Tail after Poſſibility, *&c.* from committing Waſte; it was urged, that ſhe being a Jointreſs within the 11th of *H.* 7. ought in Equity to be reſtrained from cutting Timber, that being Part of the Inheritance, which by the Statute ſhe is reſtrained from aliening; and the Court granted an Injunction againſt wilful Waſte in the Site of the Houſe, and pulling down Houſes. *Hill.* 1701. between *Cooke* and *Whaley*.

6. But where a Jointreſs, who had a Covenant that her Jointure ſhould be of ſuch a yearly Value, which fell ſhort, tho' her Eſtate was not without Impeachment of Waſte; yet the Court would not prohibit her committing Waſte, ſo far as to make up the Defect of her Jointure. *Mich.* 1698. between *Carew* and *Carew*. *But if an Action of Waſte be brought againſt her, if Chancery will injoin the Action*, Q.

7. *A.* deviſed Lands, on which Timber was growing, to his Wife for Life, Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time, and in Default of Payment, the Remainder to *C.* he paying the Legacies; and on a Bill brought by *B.* the Court gave him Leave to cut Timber for the Payment of the Legacies, tho' it was oppoſed by the Tenant for Life and the Deviſee over, he making Satisfaction to the Widow for Breaking the Ground by Carriage, Waſte, *&c. Trin.* 1690. between *Claxton* and *Claxton*, 2 *Vern.* 152.

8. So where a Man created a Term for 500 Years, in Truſt for himſelf and his Wife for Life, Remainder to Truſtees for Payment of Debts and Annuities; and by Will deviſed the Reverſion thereof to *A.* for Life, without Impeachment of Waſte, Remainder to his firſt and other Sons in Tail Male, with Remainder over; and *B.* being in Want, the Court gave him Leave to cut down Timber to the Value of 500 *l.* though the Debts and Annuities were not paid; the Truſtees having no Power to ſell the Timber, the Debts being like to have a long Continuance, and there being a great Deal of decaying Timber on the Eſtate. *Hill.* 1690. between *Aſpinwall* and *Leigh*, 2 *Vern.* 218.

# CAP. LV.

# Wills and Teſtaments.

(A) What ſhall be eſtabliſhed in Equity as a good Will of a Real Eſtate, and here of the Circumſtances requiſite by the 32 H. 8. cap. 1. and the 29 Car. 2. cap. 3.
(B) Of Teſtaments and Nuncupative Wills.
(C) Fraud in obtaining a Will where examinable.
(D) Of Republication, and in what Caſes it will make the Will good.
(E) Of Revocations in Equity.

## (A) What ſhall be eſtabliſhed in Equity as a good Will of a Real Eſtate, and here of the Circumſtances requiſite by the 32 H. 8. cap. 1. and the 29 Car. 2. cap. 3.

1. BY the Common Law, no Lands or Tenements (except by particular Cuſtom) were deviſeable by any Laſt Will or Teſtament, neither could they be transferred from one to another, but by ſolemn Livery of Seiſin, Matter of Record or ſufficient Writing. *Co. Lit.* 111. *b.* (*a*) Becauſe it was preſumed, that the Teſtator would do that *in Extremis*, that he would not do in his Health; that it proceeded from the Diſtemper of his Mind, by the Anguiſh of his Diſeaſe, or by ſiniſter Perſuaſion, to which in his Sickneſs he was more ſubject. 1 *Rol. Abr.* 608.

(*a*) The true Reaſon ſeems to be from the Nature of the feudal Tenure, and the Relation that was firſt eſtabliſhed betwixt the Lord and his Tenant. For tho' Donations, after Length of Time, were made to the Tenant and his Heirs, or the Heirs Males or Females of his Body, under certain Duties and Services expreſly reſerved, or which the Law created; and tho' the Word *Heirs, &c.* be Words of Limitation, and appropriated to meaſure out the Length or Continuance of the Eſtate; yet they were always underſtood the Heirs of the preſent Tenant; who being liable to the ſame Services when they came into the Tenancy, the Lord was to have the Tuition and Education of ſuch Heirs, in caſe they happened by Reaſon of their Minority, to be incapable of performing the Services, that ſo he might, by his Care and Diſcipline, ſecure to himſelf Tenants always capable thereof, either in their own Perſons, if they happened to be Males, or by proper Marriages with his Tenants, if they proved to be Females; and therefore by no Act of the Tenant's could he diſpoſe of the Feud, ſo as to defeat the Lord of the Advantages of his Seigniory; and hence it was, that a Tenant could not deviſe it, even to his own Heir, ſo as to make him a Purchaſer thereof; for then he coming in, not by the Donation of the Lord, but by the Diſpoſition of the Tenant, tho' he remained liable to the naked Services; yet the Lord loſt the Advantages of Wardſhip, Marriage, *&c.* which were annexed only to thoſe who came in upon the Terms of his own Donation by Deſcent.

(b) There have been ſeveral Reſolutions concerning Wills made purſuant to this Statute, ſince the Making thereof; but as the Statute 29 *Car.* 2. is now the proper Pattern to follow, having altered the Forms, by requiring more Ceremony and greater Exactneſs, it will be ſufficient barely to mention ſome of the Caſes on this. (c) That the Lands muſt be *ſua*, and therefore Lands purchaſed after the Will is made, will not paſs, *vide Plow.* 344. Title *Deviſe*, Letter (B). (d) A Deviſe of an Authority to Executors to ſell, is within the Act. *Moor* 341. *Cro. Jac.* 345. (e) A Man beyond Sea wrote a Letter, in which he declared his Will to be, that his Land ſhould go in ſuch Manner; and adjudged a good Will. *Moor* 177. *pl.* 314. So if a Man had ordered one to make his Will, and thereby to deviſe *White-acre* to *A.* and his Heirs, and *Black-acre* to *C.* and his Heirs, and he had written the Deviſe to *A.* but before the Deviſe to *C.* was wrote, the Deviſor had died; yet as to *A.* this had been a good Deviſe. 3 *Co.* 31. *b.* So a Will was held good, where a Lawyer took only ſhort Notes, with Deſign to reduce it into Form, which he afterwards did; but the Deviſor died before it was read to him. 1 *And.* 34. *Kelw.* 209. *Dyer* 72. 1 *Brown.* 44. A Will wrote without the Appointment of the Teſtator, if read to him, and approved by him, good: Signing and Sealing was not neceſſary. *Vide Cro. Eliz.* 100. *N. Dyer* 72. *a. March* 206. 2 *Leon.* 35. 1 *Sid.* 315.

2. But the (*b*) Statute 32 *H.* 8. *cap.* 1. enacts, That every Perſon (*c*) having Manors, Lands, *&c.* ſhall have Power to give, (*d*) diſpoſe, will, and deviſe by Will in (*e*) Writing, or otherwiſe, by Act executed in his Life-time, all his ſaid Manors, *&c.* any Law, Statute, *&c.* to the contrary notwithſtanding, *&c.*

3. An Uncle having deviſed his Eſtate from his Nephew and Heir at Law, a younger Brother of the Heir at Law, at the Uncle's Funeral, ſnatched the Will out of the Hands of the Executor, and tore it in many ſmall Pieces; but moſt of them, and particularly ſuch Part wherein was the Deviſe of the Land, were picked up and ſtitched together again; and on a Bill to have the Will eſtabliſhed, it was decreed, that the Deviſee ſhould (*f*) hold againſt the Heir, and he to convey to him, altho' there was no direct Proof made, that the Heir directed the Tearing of the Will. *Mich.* 1702. between *Haines* and *Haines*, 2 *Vern.* 441.

(f) A Will, tho' gnawn to pieces by Rats in the Life of the Deviſor, if by joining the Pieces together the Contents can be known, will be good; ſo if a Will continues in Writing at the Death of the Deviſor, tho' gnawn, burnt, or loſt after, it ſhall ſtand good. *Allen* 2, 55. A Writing in Form of an Indenture, and ſealed and delivered, if proved to be intended a Will, ſhall be good as ſuch. 1 *Chan. Ca.* 248. 1 *Mod.* 117.

4. *A.* by Will in Writing, atteſted by three Witneſſes, deviſed a Copyhold Eſtate to his Wife; afterwards the Teſtator, on the Day of his Death, directed his Nephew to obliterate ſome Deviſes, but nothing as to the Copyhold deviſed to his Wife, and then cauſed a *Memorandum* to be wrote, that he examined, peruſed and approved of the Will as ſo obliterated and altered by his Nephew, in his Preſence, but did not republiſh it in the Preſence of (*g*) three Witneſſes, but directed his Nephew to have it wrote out fair; but before it was brought back, he became delirious; and this was held a good Will as to the Copyhold. *Paſch.* 1705. between *Burkitt* and *Burkitt*, 2 *Vern.* 498.

(g) By the 29 *Car.* 2. *cap.* 3. it is enacted, that all Deviſes of Lands or Tenements deviſable by the Statute of Wills, or any Cuſtom, ſhall be in Writing, and ſigned by the Party deviſing, or ſome other in his Preſence, by his Direction, and ſhall be atteſted and ſubſcribed in his Preſence, by three or more credible Witneſſes, or elſe ſhall be void.

5. If a Will is atteſted by three Witneſſes, who ſeverally ſigned their Names, not being preſent together; yet each Signing being in the Preſence of the Teſtator, makes it a good Will within the Statute. 2 *Chan. Ca.* 109.

6. But if a Man ſubſcribes and publiſhes his Will in the Preſence of two Witneſſes, and they ſubſcribe it in his Preſence, and after makes a Codicil in Writing, reciting that he had made a former Will, and confirmed the ſame (except what was excepted by the Codicil) and declares

declares, that the Codicil ſhould be taken as Part of his Will, and publiſhes it in the Preſence of one of the ſame and another Witneſs; this is not a good Will, for there were not three ſubſcribing Witneſſes in the Preſence of the Teſtator; and one of the Witneſſes to the Codicil never ſaw the Will. Between *Lea* and *Lib*, 3 *Mod.* 262. adjudged, though objected, the Will and Codicil made but one Will, and the Circumſtance of three Witneſſes wanting to compleat the Will, was perfected by the Codicil.

7. So if a Man makes a Will in ſeveral Pieces of Paper, and there are three Witneſſes to the laſt Paper, and none of them ever ſaw the Firſt; this is not a good Will. 3 *Mod.* 263. *per Curiam.* A Will void for Want of Witneſſes will not operate as an Appointment to a Charity. *Vide* 2 *Vern.* 498. and Title *Charity.*

8. The Teſtator deſired the Witneſſes to go into another Room ſeven Yards diſtant, to atteſt his Will, in which there was a Window broken, thro' which the Teſtator might ſee them; and it was held, that this Will was according to the Statute of *Frauds*; for tho' the Statute requires Atteſting in his Preſence, to prevent obtruding another Will in the Place of the true one; yet it is enough if the Teſtator might ſee; it is not neceſſary that he ſhould actually ſee them Signing; for at that Rate, if a Man ſhould but turn his Back, or look off, it would vitiate the Will; and here the Signing was in the View of the Teſtator; he might have ſeen it, and that is enough; ſo if the Teſtator, being ſick, ſhould be in Bed and the Curtain drawn. *Paſch.* 3 *Jac.* 2. between *Shires* and *Glaſcock*, 2 *Salk.* 688. adjudged in *C. B.* on a feigned Iſſue.

9. If the Teſtator writes the Will with his own Hand, though he does not ſubſcribe his Name, but ſeals and publiſhes it, and three Witneſſes ſubſcribe their Names in his Preſence, it is a good Will; for his Name being wrote in the Will, it is a ſufficient Signing; and the Statute does not direct, whether it ſhall be at the Top, Bottom, *&c.* Between *Lemayne* and *Stanley*, 3 *Lev.* 1. adjudged *per totam Curiam*, and by three Judges againſt one, the Sealing is a Signing within the Act: And *note*; It is not ſaid in the Act, that the Signing ſhall be in the Preſence of the 3 Witneſſes at the ſame Time. 3 *Mod.* 219.

## (B) Of Teſtaments and Nuncupative Wills.

1. *A.* Being very ill, deſired *B.* to make her Will, who wrote down only Names and initial Letters to this Effect, *viz.* To *Tho. Weſt* 200*l.* to *Jo. Dav.* 100*l.* to *Reb. Cro.* 50*l.* to *Siſ.* to *Self* 10*l.* and ſo to ſeveral other Perſons in like Manner, to above 400*l.* which being more than her Eſtate, *B.* made an Alteration in a ſecond Column, by ſubſtracting Part of the Sums from ſome of the Legatees, as ſet down in the ſecond Column, and then told *A.* the Senſe of the propoſed Deviſes; there were two Perſons in the Room that did not hear any Thing that paſſed between *A.* and *B.* but only heard the Teſtatrix at laſt pronounce, that all was well; *B.* went to a Scrivener to have the Deviſes drawn out at Length and in Form, and before ſhe returned the Teſtatrix died; the Judge below pronounced for this Will; but upon an Appeal to the Delegates it was revers'd; and in this Caſe it was agreed, that if the Will had been written in Words at Length, ſo as they had carried a Senſe and

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Meaning in themſelves, it had been a good Will; for that there was one Witneſs that wrote it, and two that heard the Teſtatrix pronounce, that it was well; which would have been intended to have amounted to a ſecond Witneſs, in regard it appeared on all Hands, by ſeveral Witneſſes, that the Teſtatrix did then ſeriouſly diſpoſe herſelf to making her Will; and for that was quoted the Caſe of one *Pepper*, where a Perſon diſpoſed herſelf to make her Will, and dictated it to a Perſon, who wrote it down; and another, not called in as a Witneſs, lay behind the Hangings out of Curioſity, and yet ſuch Will was allowed to be good, being proved by theſe two Witneſſes; but they diſtinguiſhed this Caſe, becauſe the Will was not ſubſtantive, but was to take its Senſe from the Interpretation of the Witneſs, and ſo there would be *Innuendo* upon *Innuendo*; which made it purely a Nuncupative Will; and as ſuch, not being atteſted by the Number of Witneſſes appointed by the (*a*) Statute of Frauds and Perjuries, the Will and Legacies were void. 26 *Feb.* 1710. between *Davis* and *Gloceſter*, before the Delegates.

(*a*) By the 29 *Car.* 2. *cap.* 5. it is enacted, that no Nuncupative Will ſhall be good, when the Eſtate bequeathed exceeds the Value of 30*l.* that is not proved by the Oath of three Witneſſes that were preſent at the Making thereof, nor unleſs the Teſtator bid the Perſons preſent, or ſome of them, bear Witneſs, that ſuch was his Will, or to that Effect; nor unleſs made in the laſt Sickneſs of the Deceaſed, and in his Dwelling-houſe, or where he had been reſident ten Days, or more, before the Making of the Will; except where ſurpriſed and taken ſick from home, and died before his Return; and by the ſame Act, after ſix Months paſſed after Speaking the pretended teſtamentary Words, no Teſtimony ſhall be admitted to prove any Nuncupative Will, unleſs the Teſtimony or Subſtance thereof was committed to Writing within ſix Days after the Making the ſaid Will.—And by the ſame Act, no Probate of any Nuncupative Will ſhall paſs the Seal of any Court, till fourteen Days after the Teſtator's Death, nor ſhall be proved till Proceſs have iſſued to call in the Widow or next of Kin to conteſt it, if they will; provided Soldiers in actual Service, and Mariners at Sea, may diſpoſe of their Perſonal Eſtate, as they might before the Act.

2. Dr. *Shallmer*, by Will in Writing, gave 200*l.* to the Pariſh of St. *Clements Danes*, and after, *Prew* the Reader coming to pray with him, his Wife put him in Mind, to give 200*l.* more towards the Charges of Building their Church, at which, tho' Dr. *Shallmer* was at firſt diſturbed, yet after ſaid he would give it, and bid *Prew* take Notice of it; and the next Day bid *Prew* remember of what he had ſaid to him the Day before, and dies that Day; within three or four Days after, the Doctor's Wife puts down a *Memorandum* in Writing of the ſaid laſt Deviſe, and ſo did her Maid; *Prew* died about a Month after, and amongſt his Papers was found a *Memorandum* of his own Writing, dated three Weeks after the Doctor's Death, of what the Doctor ſaid to him about the 200*l.* and purporting that he had put it in Writing the ſame Day it was ſpoken; but that Writing which was mentioned to be made the ſame Day it was ſpoken, did not appear, and theſe three *Memorandums* did not expreſly agree; about a Year after, on Application by the Pariſh to the Commiſſioners of Charitable Uſes, and producing theſe *Memorandums*, and Proof by Mrs. *Shallmer* and her Maid, they decreed the 200*l.* But on Exceptions taken by the Executors, the Decree was diſcharged of this 200*l.* and my Lord Chancellor held it not good, becauſe it was not proved by the Oath of three Witneſſes; for tho' Mrs. *Shallmer* and her Maid had made Proof, yet *Prew* was dead; and the Statute in that Branch requires not only three to be preſent, but that the Proof ſhall be by the Oath of three Witneſſes. *Trin.* 1704. between *Philips* and the Pariſh of St. *Clements Danes*.

3. A Daughter depoſites 180*l.* in the Hands of her Mother (the Defendant) and afterwards makes her Will in Writing, and thereby

deviſes ſeveral Legacies, and makes her Mother Executrix, but takes no Manner of Notice of this 180*l.* afterwards, by Word of Mouth, ſhe deſires her Mother to give this 180*l.* to the Plaintiff, if ſhe thought fit, and then ſoon after died; the Mother proved the Will, and this Bill was brought againſt her, to have the 180*l.* paid. The Mother, by her Anſwer, admits ſhe had ſuch a Sum in her Hands; that her Daughter did make ſuch a Requeſt to her, but that ſhe left it to her Election, whether ſhe would give it to the Plaintiff, or not, by the very Form of the Deviſe; and inſiſted, that ſhe did not think fit to give it to the Plaintiff. And in this Caſe it was agreed, that this was not good as a Nuncupative Will, being above 30*l.* and not reduced into Writing within ſix Days after the Speaking, as the Statute requires. 2*dly*, That if the Defendant had inſiſted on the Statute of Frauds and Perjuries, the Court could not have relieved the Plaintiff, as upon a Truſt; but in this Caſe the Defendant having by Anſwer confeſſed the Truſt, there was no Danger of Perjury, from Variety of Proof, which was the Miſchief the Statute intended to provide againſt; and therefore the Court took it to be in Nature of a Truſt, and decreed for the Plaintiff; and relied principally on the Caſe of *Kingsman* and *Kingsman*, where a Man deviſed away an Eſtate of 2000*l. per Ann.* and upwards, from his Son and Heir, to a Bargeman, and by his Will deviſed 20*l.* a *Quarter* to his Son; and at the Time of his Will deſired, that if his Son gave him no Trouble or Diſturbance concerning his Will, and behaved himſelf well, that he might make it up 40*l.* a Quarter, if he thought fit; and the Court decreed the 40*l.* to the Son. *Paſch.* 1718. between *Jones* and *Nabbs*. But *note*; *the* 40 l. per *Quarter*, *in the Caſe of* Kingſman *and* Kingſman, *ſeems to have been decreed purely upon the Circumſtances and Hardſhip of the Caſe; but in the preſent Caſe there were no ſuch Circumſtances or Ingredients of Hardſhip on the Plaintiff.*

## (C) Fraud in obtaining a Will, where examinable.

1. *A.* Made his Will, and thereby gave the Plaintiff the greateſt Part of his Perſonal Eſtate, to the Value of 5000*l.* as was proved in the Caſe; but one *B.* his Maid Servant had in his Sickneſs prevailed on him (as was alledged) to make another Will, and to marry her a Week before his Death, when he lay in his ſick Bed, at ſix of the Clock at Night, tho' it was really proved by two Miniſters, that ſhe was, a Year before, actually married to the Defendant *M.* and was then his Wife, and that *M.* procured the Licence for the Marriage of *A.* to *B.* and this Will being ſet up by *M.* Executor to *B.* though it appeared there was as groſs a Practice as could be in gaining the Will, the Teſtator being *Non Compos*, both at the Time of Making this Will, and alſo at the Time of this ſuppoſed Marriage, and that in his Health, he knew that *M.* and *B.* were married, and that *B.* ſuppreſſed the firſt Will; yet that Will ſo ſet up, being proved in the Prerogative Court, and the Matter in Queſtion being purely relating to the Perſonal Eſtate, the Lord *Chancellor* was of Opinion, that whilſt that Probate ſtood, this Matter was not examinable in Chancery; and tho' the Fraud was fully proved, as aforeſaid, and was opened to him, he would not hear any Proofs read, but diſmiſſed the Bill. *Trin.* 1686. between *Archer* and *Moſſe*, 2 *Vern.* 8, 9.

2. But though Wills gained by Fraud, and proved in the Spiritual Court are not to be controverted in Equity; yet if the Party claiming under ſuch Will comes for any Aid in Equity, he ſhall not have it. 2 *Vern.* 76.

3. It being urged, that a Will concerning Land is only triable at Common Law, and that the Party there may take Advantage of any Fraud or Impoſition on the Teſtator, and therefore not proper to be examined into, or ſet aſide in Equity upon Pretence of Fraud or Surprize; my Lord *Chancellor* held, that there may be a Fraud in obtaining a Will that may be relievable in Equity, and of which no Advantage can be taken at Law; as if a Man agrees to give the Teſtator 2000*l.* in Bank-Bills, if he will deviſe his Eſtate to him; and on the Delivery of ſuch Bills makes his Will, and deviſes his Eſtate to him, and the Bills prove to be forged or counterfeit. 2 *Vern.* 700.

4. But it has been decreed in the Houſe of Lords, that a Will of a Real Eſtate could not be ſet aſide in a Court of Equity for Fraud or Impoſition, but muſt firſt be tried at Law, on *Deviſavit vel non*, being Matter proper for a Jury to inquire into. *July* the 28th, 1728. between *Bransby* and *Kerridge*.

## (D) What will amount to a Republication, and where a Republication will make the Deviſe good.

1. IF a Man deviſes certain Lands, and after aliens the Land to a Stranger, and repurchaſes; and after ſhews his Intent, that the ſaid Will ſhall be his Will, this is a new Publication, and the Land ſhall paſs by the Deviſe. 44 *E.* 3. 33. 2 *R.* 3. 3. *Vide* 1 *Vern.* 330.

2. So the Teſtator's Saying, his Will was in a Box in his Study, amounted to a new Publication. Between *Cotton* and *Cotton*, 2 *Vern.* 209. cited to have been tried before *North* Ch. Juſt.

3. If a Man ſeiſed of Lands deviſes all his Lands to *J. S.* and afterwards purchaſes the Manor of *D.* and after writes in his Will, that *J. D.* ſhall be his Executor; yet this is not any new Publication to make the Lands paſs. 1 *Roll. Abr.* 618.

4. But if after the Purchaſe of the Manor of *D.* he delivers the firſt Will as his Will, and ſays that it ſhall be his Will, without putting any Words thereto; yet this is a new Publication, to make the Lands newly purchaſed paſs. 1 *Roll. Abr.* 618. 1 *Salk.* 237.

5. So if a Man ſeiſed of Lands in *D.* deviſes to another, by his Will in Writing, all his Lands in *D.* and after purchaſes other Lands in *D.* and after one *J. S.* comes to him, and requeſts him to give him the Buying of the Lands laſt purchaſed; and he Anſwers him, that he will not, but that his Intent was, that thoſe Lands ſhould go to his Executors (for the Deviſee was made Executor by the Will) as his other Lands ſhould; and after the Deviſor cauſes a Codicil to be Writ, in which there is a Deviſe of ſeveral Perſonal Things, as Corn, and Implements of Houſhold, and annexes it to his firſt Will; and after dies without other Publication; yet this ſhall be a ſufficient Publication to make the Lands newly purchaſed to paſs by the Will, for there needs no other Words in the Will than there were before; and his Intent appears, that it ſhould be his Will

by the Annexing the Codicil. 1 *Rol. Abr.* 618. *Moor* 404. *S. C. Cro. El.* 493. *S. C. Goulſ.* 150.

6. But if a Man has Iſſue two Daughters, *A.* and *B.* and he deviſes Lands to *A.* and to the Heirs of her Body, and for Want of Iſſue, to *B.* and *A.* dies in the Life-time of the Teſtator, leaving Iſſue, though after the Teſtator annexes a Codicil to his Will, and thereby diſpoſes of ſome Part of his Perſonal Eſtate; yet this will not amount to a Republication of the Will, nor give any Title to the Iſſue of *A. Mich.* 1716. between *Hutton* and *Simpſon*, 2 *Vern.* 722. Reſolved *per Curiam*, though the Teſtator had declared in his Will, that *B.* had married againſt his Conſent, and that what he had given her, was in full of her Portion, and in Bar of any further Part of his Real Eſtate.

7. If one deviſes a Leaſe to his Daughter, and afterwards renews the Leaſe, and afterwards adds his Codicil to his Will, without taking any Notice of the Leaſe, whether the Renewal of the Leaſe is a Revocation, and whether the Adding a Codicil to his Will is Republication, *Quære*; *& vide* 2 *Vern.* 209.

8. If a Man has Iſſue three Sons, *A. B.* and *C.* and deviſes Lands to *B.* in Tail, Remainder to *C.* and *B.* has Iſſue two Sons, and dies; and after the Deviſor ſays, my Will is, that the Sons of *B.* ſhall have the Lands deviſed to their Father, as they ſhould have had if he had lived, and had died after; and then the Deviſor dies; whether this ſhould amount to a new Publication *dubitatur*; and two Judges againſt Two. *Fuller* and *Fuller*, *Cro. Eliz.* 422.

9. If *J. S.* has Iſſue two Sons, *William* and *Robert*, and *Robert* has Iſſue a Son named *Robert*, and *J. S.* deviſes Lands to his Son *Robert*, and his Heirs, and by the ſame Will gives his Grandſon 50 *l.* and *Robert* the Son dies; and after *J. S.* by Parol republiſhing his Will ſays, *Robert* my Grandſon ſhall take by my Will as *Robert* my Son ſhould have done; yet the Grandſon ſhall not have the Lands, for Lands cannot paſs but by Will in Writing; and his Son *Robert* cannot import his Grandſon *Robert*, eſpecially when by the ſame Will he has made a Diſtinction between Son and Grandſon. *Hill.* 30 *Car.* 2. between *Strode* and *Berager*, 2 *Lev.* 243. The Judgment to the contrary given by three Judges againſt the Opinion of *Scroggs* in the Common Pleas, is ſaid by the Reporter to have been reverſed in *B. R.* (as he heard) though it was argued, that the Words of the Will were proper enough to paſs the Lands to the Grandſon; for that the Addition of Grand, only imported a Diſtinction between Father and Son while Living; but that the Father being dead at the Time of the Republication, the Grandſon might properly be deſcribed by the Name of Son. 2 *Mod.* 313. *S. C.* 1 *Vent.* 341. 2 *Jon.* 135. *Raym.* 408.

## (E) Of Revocations in Equity.

1. A Man makes his Will duly executed and atteſted according to the Statute of Frauds and Perjuries, and at the ſame Time in like Manner executes a Duplicate thereof; ſome Time after the Teſtator having a Mind to change one of his Truſtees, orders his Will to be wrote over again, without any Variation whatſoever from the Firſt, ſave only in the Name of that Truſtee; and when it was ſo wrote

wrote over, he executes it in the Preſence of three Witneſſes, and the three Witneſſes ſubſcribed their Names, but not in his Preſence; after this the Teſtator cancels the Duplicate, by tearing off the Seal, and then dies; and the Queſtion was, whether this ſecond Will, not being good as a Will to paſs Lands, ſhould yet be a Revocation of the firſt; and if it ſhould not, whether the Cancelling the other ſhould be a Revocation thereof within the Statute of Frauds and Perjuries. And it was decreed, that neither the Making the Second, nor the Cancelling the firſt, was a Revocation thereof; though in the Second there was an expreſs Clauſe, that he did thereby revoke all former and other Wills; wherein my Lord Chancellor took this Diſtinction, that the Second was not intended barely a Revocation of the Firſt, ſo as to ſignify his Intention of dying Inteſtate, or without any Will; but it was intended as an effectual Will to paſs the Lands to the Perſons, and in the Manner thereby deviſed; and therefore, if it was not good as a Will to that Purpoſe, it was no Revocation of the Firſt, but as it was ſuppoſed to be valid as a Will for paſſing the Lands by the Second; and if a Man by his Will deviſes Lands to *A.* and after makes a ſecond Will, and thereby deviſes the ſame Lands to *B.* if this ſecond Will be not good as a Will to paſs the Lands to *B.* it ſhall be no Revocation of the Deviſe in the firſt to *A.* for it is plain *A.* was to loſe only what *B.* was to gain; and if *B.* gains nothing by the Second, *A.* ſhall loſe nothing that was given him by the Firſt; but if a Man executes a ſecond Will, which appears to have no other Intention than to revoke the Firſt, and to die Inteſtate, though this Second be not in all Circumſtances duly executed as a Will whereby to paſs Lands, yet it will operate as a Revocation of the Firſt; and as to the Cancelling or Tearing of the firſt Will, that is no Revocation of it in this Caſe, becauſe that was no ſelf-ſubſiſting independent Act, but done to accompany, or in a Way of Affirmation of the Second; it was done from an Opinion, that the Second had effectually revoked the Firſt, and therefore he tears the Firſt, as of no Uſe; but if the Firſt was not effectually revoked by the Second, that Act of Tearing the Firſt will not deſtroy it neither; for tho' a Man may by the Statute of Frauds as effectually deſtroy his Will, by Tearing or Cancelling it, as by making a Second; yet if he does make a Second, and intends that as a Revocation of the Firſt, if it be inſufficient for that Purpoſe, as in the principal Caſe, the Tearing and Cancelling being only in Conſequence of his Opinion, that he made a good ſecond Will, ſhall not deſtroy the Firſt; but it ought to be ſet up again in Equity. *Hill.* 1716. between * *Onyons* and *Tryers* decreed. *Vide* 3 *Mod.* 220, 258. 3 *Lev.* 86, 87.

* 2 *Vern.* 741, 2. S. C.

2. But if a Man cancels or revokes either the Duplicate or original Will, this is an effectual (*a*) Avoiding of both, they being both but one Will, and therefore muſt ſtand or fall together. 2 *Vern.* 742. *per Curiam*; and ſaid to have been ſo reſolved in Sir *Edw. Seymour*'s Caſe.

(*a*) By the 29 *Car.* 2. *cap.* 3. it is enacted, that no Deviſe in Writing of Lands, Tenements or Hereditaments, or any Clauſe thereof, ſhall be revocable, otherways than by ſome other Will or Codicil in Writing, or other Writing declaring the ſame, or by Burning, Cancelling, Tearing, or Obliterating the ſame by the Teſtator himſelf, or in his Preſence, and by his Direction and Conſent, but ſhall continue, &c. unleſs altered by ſome other Will or Codicil in Writing, or other Writing of the Deviſor, ſigned in the Preſence of Three or more credible Witneſſes, declaring the ſame. And by the ſame Act, no Will in Writing concerning Perſonal Eſtates ſhall be repealed, nor any Clauſe or Bequeſt therein altered by Words, or Will by Word of Mouth only, except the ſame be in the Life of the Teſtator committed to Writing, and read to and allowed by him, and proved to be done by three Witneſſes.— But where a Man by Will in Writing deviſed the Reſidue of his Perſonal Eſtate to his Wife, and after, ſhe dying, he by a Nuncupative Codicil bequeathed to *J. S.* all that he had given to his Wife; and it was reſolved good; for by the Death of the Wife, the Deviſe of the Reſidue was totally void; and the Codicil was no Alteration of the former Will, but a new Will for the Reſidue. *Raym.* 334.

3. A Man makes his Will in Writing, and thereby deviſes all his Real and Perſonal Eſtate to his Wife, her Heirs and Executors, in Truſt to pay his Debts and Legacies, and then deviſes ſeveral Legacies to his Children and other Perſons, and concludes, *In Witneſs whereof I have, to this my laſt Will and Teſtament containing nine Sheets of Paper, and to a Duplicate thereof, to be left in the Hands of ſuch a one, ſet my Seal to every Sheet thereof, and to the laſt of the ſaid Sheets my Hand and Seal, in the Preſence of three Witneſſes*, who all ſubſcribed their Names in due Form of Law; afterwards the Teſtator being minded to add other Truſtees to his Wife, and make ſome little Alterations in his Will, ſends for a Scrivener, and gives Directions to prepare a Draught of Inſtructions for another Will, which the Scrivener does accordingly, which the Teſtator read over and approved very well, and ſets his Hand to it; and being at a Tavern, thinking he had now made a new Will, he pulls out of his Pocket the firſt Will, and tears of the Seals from the firſt eight Sheets, which the Scrivener ſeeing, asked him what he was doing. *Why ſays he, I am cancelling my firſt Will. Pray, ſays the Scrivener, hold your Hand, the other Will is not perfected, it will not paſs your Real Eſtate for Want of being executed purſuant to the Statute of Frauds and Perjuries.* I am ſorry for that, ſays he, and immediately deſiſted from tearing off the Seals, and in ſome ſhort Time after dies, without having done any Thing further to perfect the ſecond Will, or cancelling the Firſt; after his Death, on Application to the Spiritual Court by the Wife, who was made Executrix of this laſt Will, they ſentenced it a good Will as to the Perſonal Eſtate, and admitted her to prove it; and on a Bill brought by the Legatees againſt the Wife and other Truſtees, to have a ſpecifick Performance of the Truſts in the firſt Will, and that the Eſtate might be ſold purſuant to the Directions of that Will; it was inſiſted upon, that the firſt Will was revoked, either by Making of the Second, or by the Tearing off the Seals from the Firſt. But my Lord *Chancellor* held, that the ſubſequent Will could be no Revocation as to the Real Eſtate, not being executed according to the Statute of Frauds and Perjuries; and that as to the Tearing off the Seals from the Firſt eight Sheets, that not being done *animo cancellandi*, was no Revocation; and that the Seal remaining whole to the laſt Sheet was ſufficient, and in Strictneſs it was not neceſſary that all the Sheets ſhould be ſealed; but becauſe the Spiritual Court had ſentenced the Second a good Will of the Perſonal Eſtate, his Lordſhip held it a good Will for the whole Perſonal Eſtate; and that ſuch Legatees of Perſonalties in the firſt Will, as are left out in the Second, muſt loſe their Legacies; but for thoſe that had Legacies by the firſt Will, chargeable on the Real Eſtate, if the ſame Legacies were deviſed to them by the ſecond Will, that they ſhould ſtill continue chargeable on the Real Eſtate; provided ſuch Legacies were not increaſed or inlarged by the ſecond Will; for though the ſecond Will was not ſufficient in itſelf to charge the Real Eſtate, yet ſince the Real Eſtate remained well deviſed by the firſt Will, they ſhould be ſtill ſecured by that Real Eſtate, for they were not deviſed out of Land like a Rent, but only ſecured by Land, which before was well deviſed; but for other new abſolute Perſonal Legacies deviſed by the Laſt Will, they ſhould be chargeable only upon the Perſonal Eſtate, and ſhould have the Preference to be firſt paid out of the Perſonal Eſtate before the other Legacies in the firſt

Will, charged upon the Real Eſtate, becauſe they had their ſeveral Funds out of which they were to be paid. *Hill.* 6 *Ann.* between *Hyde* and *Hyde.*

4. If *A.* deviſes Lands to *B.* and his Heirs, and afterwards mortgages the ſame Lands to *J. S.* for Years, or in Fee, tho' a Mortgage in Fee be a total Revocation at (*a*) Law, yet in Equity it ſhall be a Revocation *pro tanto* only. 1 *Vern.* 329, 342, 97, 141, 182. 1 *Salk.* 158. *S. P.* admitted to be a ſettled Point in Equity.

(*a*) Vid. 1 *Rol. Abr.* 616.

5. So if a Man ſeiſed in Fee deviſes it to *J. S.* in Fee, or for Life, and afterwards makes a Leaſe to *J. D.* for Years, this, even at Law, ſhall not be a Revocation, but during the Years; for his Intent does not appear further than during the Term for Years. Between *Mountague* and *Jefferies*, 1 *Rol. Abr.* 616.

6. So if a Husband poſſeſſed of a Term for forty Years deviſes it to his Wife, and after leaſes the Land to another for twenty Years, and dies, this Leaſe is not any Revocation of the whole Eſtate, but only during the twenty Years, and the Wife ſhall have the Reſidue by the Deviſe. Between *Wilcox* and *Kent*, 1 *Rol. Abr.* 616.

7. But if *A.* deviſes Lands to *B.* and his Heirs, and twelve Years after Leaſes the ſame Lands to *B.* for ſixty Years, to commence after his Death, and delivers the Deed to a Stranger, to the Uſe of *B.* who does not deliver it to *B.* till after the Death of *A.* this is a Revocation of the whole Eſtate; for both Eſtates are not conſiſtent, nor can veſt in *B.* at the ſame Time; and it was plainly the Intention of the Deviſor, that *B.* ſhould have the leſs Eſtate only. *Hill.* 45 *Eliz.* between *Coke* and *Bullock*, *Cro. Jac.* 49. adjudged, tho' objected, that it was the Intention of *A.* that *B.* ſhould have his Liberty to take by the Leaſe or Deviſe, *B.* not having agreed to the Leaſe in the Life of *A.*

8. But if the Leaſe made to the Deviſee had been to begin either *in Præſenti* or *Futuro*, in the Life of the Deviſor, it had not been a Revocation; for inaſmuch as the Leaſe might have determined in his Life, it was conſiſtent with his Will. *Cro. Jac.* 49. *per Curiam.*

9. So where *A.* by Will deviſed to his younger Son a certain Meſſuage for ninety-nine Years, if three Lives lived ſo long, yielding and paying to his Siſter, the Plaintiff, 20 *l. per Ann.* until twelve Years old, and thence 40 *l. per Ann.* for Life; and afterwards the ſaid *A.* for 300 *l.* Fine demiſed the ſaid Meſſuage to *J. S.* for ninety-nine Years, if three Lives lived ſo long, yielding and paying 50 *l. per Ann.* to *A.* the Teſtator, his Heirs and Aſſigns; and tho' it was held at the *Rolls* to be a Revocation, yet on an Appeal to my Lord *Keeper*, he decreed it to be no Revocation, and that the Daughter ſhould be paid her Annuity; and he ſaid, that the Rule is, where a ſubſequent Act ſhall amount to a Revocation by Implication, it muſt be a neceſſary Implication; and the Act muſt be wholly inconſiſtent with the Deviſe. *Paſch.* 1705. between *Lamb* and *Parker*, 2 *Vern.* 495.

10. So if *A.* deviſes Lands to Truſtees to pay his Debts, and then to pay his Wife 200 *l. per Ann.* for her Life; and the Teſtator living ſeveral Years after, his Debts increaſed from 2000 *l.* to 10000 *l.* for 8000 *l.* whereof his ſaid Truſtees were bound, and afterward *A.* the Teſtator, by Deed and Fine conveys his Lands to his ſaid Truſtees, to ſell to pay his Debts, and the Surplus to him and his Heirs; and though the Wife joined with him in the Fine and Conveyance, yet this ſhall be no Revocation of the Wife's 200 *l. per Ann.* and ſhe ſhall have the 200 *l. per Ann.* out of the Surplus of the Money, after the Debts

paid. *Mich.* 1691. between *Vernon* and *Jones*, 2 *Vern.* 241. decreed; but the Reporter adds a *Q.*

11. But in a Caſe where *Edward*, Earl of *Lincoln*, had mortgaged the Manor of *S.* to the Defendant *Wynn* and his Heirs, for 12000 *l.* and afterwards, by his Will, in Default of Iſſue Male of his own Body, deviſed it to Sir *Fran. Clinton* (who was to ſucceed him in the Honour) for his Life, with Remainder to his Firſt and other Sons in Tail Male, with other Remainders over; and appointed that his Houſhold-Goods at his chief Houſe at *S.* ſhould remain there as *Heir-looms* to the next Heir Male, who ſhould be *Earl of Lincoln*; and made Sir *Francis Clinton* Executor; afterwards the Earl (who was very whimſical) took a Fancy to one Mrs. *Calvert*, Daughter to the Lord *Baltimore*, and fancied he would marry her, (though it was proved in the Cauſe, there never was any Intention of ſuch Marriage in her, or in any of her Relations, nor any Treaty about it,) and in this Fancy he makes a Leaſe and Releaſe of thoſe Premiſſes to the Defendants *Davenport* and *Townſend* and their Heirs, (in Conſideration of the ſaid intended Marriage, as it was expreſſed,) to the Uſe of himſelf and Heirs, till the ſaid intended Marriage took Effect; then as to Part in Truſt for Mrs. *Calvert* and her Heirs, in Lieu of her Dower, and as to the Reſt in Truſt that the Truſtees ſhould ſell it, to diſincumber that Part limited to Mrs. *Calvert*, and the Surplus of the Money to his Executors and Adminiſtrators; there was no farther Progreſs towards the Marriage; and ſometime after the Earl died, without any Alteration of his Will, and the Honour deſcended to Sir *Francis Clinton* (who had but a very ſmall Eſtate, if any,) who died ſoon after; and the Plaintiff, his eldeſt Son and Heir, an Infant of about ſeven Years old, brought his Bill to have the Redemption of the Mortgage, and a Conveyance of the Eſtate; and the Defendants *A. B.* and *C.* who were Couſins and Coheirs of *Earl Edward*, brought a Croſs-Bill, that they might redeem and have the Eſtate conveyed to them. And the only Queſtion was, whether this Leaſe and Releaſe were a Revocation of the Will. It was ſaid for the Plaintiff, that the Earl had but an equitable Intereſt (the whole Eſtate being before mortgaged in Fee,) and therefore it ought to be conſidered according to Equity; and that tho' ſuch a Leaſe and Releaſe would have been a Revocation of a Deviſe of a legal Eſtate, yet it will not be ſo here; for the Reaſon the Law goes upon in judging it a Revocation is, becauſe the Leaſe and Releaſe is a Conveyance of the Eſtate, and ſo *ex neceſſitate rei* a Revocation of the Deviſe; and it is plain the Law goes upon this, and not upon any ſuppoſed Alteration in the Perſon's Will; for if a Man makes a Will, and thereby deviſes Lands to *J. S.* and his Heirs, and afterwards articles to ſell the Lands to *J. D.* and his Heirs, and receives the Purchaſe-money, and dies before any Conveyance made, theſe Articles will be no Revocation of his Will; and yet it is as plain his Mind and Intention, as to thoſe Lands, is altered, as much as if he had actually made a Conveyance to *J. D.* and in Caſe of an equitable Intereſt, the Leaſe and Releaſe makes no Alteration of the Eſtate, ſo as to induce a Neceſſity of adjudging it a Revocation, as there is in Caſe of a legal Eſtate; it is plain as to his Intention, that he did not intend any Revocation or Alteration of his Will, unleſs or until that Marriage ſhould take Effect, for by the Releaſe it is limited, that till that Marriage it ſhould be to him and his Heirs, which is juſt as it was before; and that Marriage

riage having never taken Effect, the Eſtate continues juſt as it was; and it cannot be pretended, that this Leaſe and Releaſe are any expreſs Revocation of his Will; and the Court of Chancery is ſo far from following the ſtrict Rules of legal Revocations, that it often relieves againſt them; and therefore if a Man deviſes *Black-acre* to *J. S.* and his Heirs, and afterwards mortgages to *J. D.* and his Heirs, this in Law is a Revocation of the Deviſe, and yet in Equity it ſhall be none farther than to let in the Mortgage; and to this Purpoſe were cited ſeveral Caſes; and therefore ſince the Court of Equity muſt interpoſe for one Side or t'other, it was concluded it ought to interpoſe for the preſent Earl, and that he ought to have the Redemption of the Eſtate, as deviſed by the Will of Earl *Edward*. For the Defendant it was ſaid, that ſuch a Leaſe and Releaſe would have been a Revocation of a Deviſe of a legal Eſtate, and that equitable Eſtates are governed by the ſame Rules that legal Eſtates are; and there is no Fraud or Circumvention, nor other equitable Circumſtances, to make the Court vary from that Rule in this Caſe; and the Will is in Diſinheriſon of the Heir, who is always favoured in all Courts; and as to the Caſes put, where Mortgages have been held to be no Revocation in Equity, it was ſaid the Reaſon of that is, becauſe Mortgages are not conſidered as Conveyances of the Eſtate, but only Charges upon it; and my Lord *Keeper* was of this Opinion, and decreed the Plaintiff's Bill to be diſmiſs'd, and the Coheirs to have the Redemption of the Mortgage. *Trin.* 1695. between the Earl of *Lincoln* and *Rolls & al'*, *Show. P. C.* 154. S. C. and the Decree affirmed in the Houſe of Lords.

12. So where Sir *John Huband*, by Will in Writing dated the 12th of *Feb.* 1708. deviſed ſeveral pecuniary and ſpecifick Legacies, and then gave all the Reſt of his Real and Perſonal Eſtate, after all his Debts and Legacies paid, to *John Pollen*, on Condition he took the Name of *Huband* upon him and the Heirs Males of his Body, with divers Remainders over; afterwards, by Leaſe and Releaſe the 30th of *Aug.* 1709. Sir *John Huband*, together with *J. S.* his Truſtee, conveyed ſeveral Manors and Lands in the County of *Warwick* to Truſtees and their Heirs, to the Uſe of himſelf for Life, without Impeachment of Waſte, and that the Truſtees and their Heirs ſhould execute ſuch Conveyance and Conveyances thereof, as the ſaid Sir *John* by Writing under his Hand and Seal, or by his Laſt Will and Teſtament, ſhould direct or appoint; and in 1710. Sir *John* died, without altering or revoking the ſaid Will, or making any other Appointment touching the ſaid Real Eſtate; and the Queſtion was, whether this Leaſe and Releaſe were a Revocation of the Will, or not; the original Bill of *Pollen* being to eſtabliſh the Will, and the Croſs-Bill to ſet aſide the Will, and have an Account of the Profits; and it was decreed, that the Leaſe and Releaſe were a Revocation of the Will. *Mich.* 1712. between *Pollen* and *Huband*.

13. *A.* having Iſſue four Daughters, and no Male Iſſue, deviſes Lands to Truſtees, in Truſt to permit his Daughter *S.* to receive the Rents and Profits until her Marriage or Death; and in Caſe ſhe married with the Conſent of Two of the Truſtees and her Mother, then to convey the Premiſſes to her and her Heirs; but if ſhe died before Marriage, or married without ſuch Conſent, then to convey to other Perſons; afterwards *S.* marries in the Life-time of her Father, and with his Conſent, and he ſettled Part of thoſe Lands on

her and her Husband, and died; and it was held, that this Settlement was no Revocation of the Will, as to the Deviſe of the other Lands. *Mich.* 1716. between *Clarke* and *Berkley*, 2 *Vern.* 720. Vid. *Where a Deviſe ſhall be a Satisfaction, Title* Deviſe, *Letter* (L.)

14. *A.* made his Will, and therefore made his Brother Executor, and deviſed unto his Executor all his Eſtate both Real and Perſonal, and four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix; and the Queſtion was, whether the Brother ſhould have the Perſonal Eſtate; and it was urged, that he ſhould, for he does not take it as Executor only, but by expreſs Words of Gift in the Will; and it appears, that there was not only a Benefit intended him as Executor, for even the Real Eſtate was deviſed to him; but it being in Proof, that he had not any the leaſt Real Eſtate in the World, it was ſaid by my Lord *Chancellor*, that the Perſonal Eſtate was deſigned him only as Executor; and it was thereupon decreed for the Widow, the Executrix. 1 *Vern.* 23.

15. *J. S.* being a Bachelor, made his Will, and deviſed a Legacy of 500 *l.* to his Brother, and other Legacies to other Perſons, and deviſed his Real Eſtate to *Eliz. Cloſe* and her Heirs, and afterwards intermarries with the ſame *Eliz. Cloſe*, and died, leaving her *Privement enſeint* with a Son, without making any Alteration in his Will; and the main Queſtion in the Caſe was, whether this Alteration in the Teſtator's Circumſtances did of itſelf, without more ado, amount to a Revocation of the Will. Thoſe who argued for its being a Revocation, relied on the Caſe of one *Ayres*, in which it was reſolved by the Judges, that where a Man that was unmarried made a Will, and deviſed away his Eſtate, and afterwards married and had a Child, and died without making any Revocation of his Will, that this Alteration of Circumſtances was in it ſelf a Revocation of the Will; and a Caſe was cited out of *Cicero*, where one thinking his Son dead, deviſed his Eſtate to another, yet the Son returning, held he ſhould have it, becauſe it was not to be ſuppoſed he would have diſinherited him without Reaſon. On the other Side it was argued, that tho' Alteration of Circumſtances might in ſome Caſes amount to a Revocation of a Will; yet not in this, for here is nothing but what a reaſonable Man might do, nothing unjuſt or unjuſtifiable; it appeared he had an Intention of marrying *Eliz. Cloſe* when he made the Will, though perhaps he might not know, when he died, that his Wife was *enſeint*; or if he did, yet it is not uncommon for many, who are kind to, or fond of their Wives, to leave their Children wholly in their Power, to make them the more Dutiful to her, and that he muſt know the Son would be the Wife's Heir as well as his, and would have the Eſtate as ſuch, if ſhe did not diſpoſe of it from him. My Lord *Keeper* was clear of Opinion, that Alteration of Circumſtances might be a Revocation of a Will of Lands as well as of a Perſonal Eſtate; and that notwithſtanding the Statute of Frauds and Perjuries, which does not extend to an implied Revocation; but no ſuch Alteration appears here, for no Injury is done any Perſon; and thoſe are provided for whom the Teſtator was moſt bound to provide for; and ſo eſtabliſhed the Will. *Trin.* 1702. between *Brown* and *Thompſon*.

# CAP. LVI.

# Writs.

(A) Of Writs of Error, and Writs mandatory, when to iſſue.

(B) Of ſuperſeding Writs, for what Cauſes.

## (A) Of Writs of Error, and Writs mandatory, when to iſſue.

1. *A.* Being indicted for not coming to Church, and found guilty, Application was made to the *Attorney General*; they might bring a Writ of Error; but he refuſed thereof; and thereupon the Lord *Keeper* was moved for ſuch a Writ; but he ſaid, that though he had the Cuſtody of the Great Seal, yet he would make no Uſe thereof, but according to the Courſe of the Court, and therefore could not put the Seal to a Writ of Error, till it had been firſt ſigned and allowed by the Attorney General; and he took it, that a Writ of Error in a criminal Matter was *ex gratia Regis* in all Caſes, but where Proviſion is made for the ſame by the Statute, and is not due *ex debito Juſtitiæ*, or *de curſu*; but if there were real Error in the Caſe, and a Writ of Error was not ſought for Delay, the Way was to petition the King, and he would give Directions for inſpecting the Proceedings, and ſee if there was real Error, or whether a Writ of Error was ſought purely for Delay. *Paſch.* 1683. between *Crawle* and *Crawle*, 1 *Vern.* 170, 175. *S. P.* And the *Attorney General* ſaid, that *A.* being indicted on the Statute 3 *Jac.* 1. no Error could avail him, and the Indictment could not be quaſhed, nor the Proceedings avoided, otherwiſe than by Conformity.

2. A Motion was made, that the Lord *Keeper* would grant a mandatory Writ to the Chief Juſtice of the *King's Bench*, to command him to ſign a Bill of Exceptions in the Caſe of the Lord *Gray & al'*, who were convicted for a Riot in *London*; and they produced a Precedent, where, in a like Caſe, ſuch Writ had iſſued out of Chancery to the Judge of the Sheriff's Court in *London*; but the Lord *Keeper* denied the Motion, for that the Precedent they produ-

ced was to an inferior Court, and he would not presume but the Chief Justice of *England* would do what should be just in the Case; for possibly you may tender a Bill of Exceptions which has false Allegations in it, and the like; and then he is not bound to sign it; for that might be to draw him into a Snare; and said, if they had Wrong done them, they might right themselves by an Action on the Case, and if this Court had a Power to grant such a Writ, the same was discretionary only, as Writs of Error are in criminal Cases, which are discretionary, and not *de cursu*. *Trin.* 1683. 1 *Vern.* 175.

## (B) Of superseding Writs, for what Causes.

1. A. Being excommunicated for Contumacy, and a Writ of *De excommunicat' capiend'* awarded, it was moved for a *Supersedeas* to the Writ, by Reason that the *Significavit* was general and uncertain; but it was said by the Lord *Chancellor*, that a *Supersedeas* could not be granted on that Ground; but if the Excommunication were not for any of the Offences within the Statute 5 *Eliz.* and the *Significavit* did not express the same, the Remedy expresly appointed upon that Statute is a *Habeas Corpus*, and upon the Return of it the Parties shall be discharged; but it being then alledged, that an Appeal was brought, and Security given to prosecute it with Effect, a *Supersedeas* was awarded, the Lord *Chancellor* saying, that the Appeal was a *Supersedeas* of it self. *Mich.* 1681. *The King* versus *Sneller*, *Russell & al'*.

2. Upon a Motion made for a *Supersedeas* to a Writ *De Cautione admittenda*, for that they had taken a Writ to the Sheriff, without any Affidavit filed, that the Bishop refused to admit of Caution, and for that Reason a *Supersedeas* was awarded; and the Lord *Keeper* declared, that finding this Court often troubled for Writs *De cautione admittenda*, he thought the Right of it was, that if there was a Sentence for a Man to pay Money, or do any other Thing in the Spiritual Court, a Man ought first to perform that, before he is admitted to his Writ *De cautione admittenda*; for it is in vain to take Security *Parere mandatis Ecclesiæ*, whilst a Man refuses the Sentence; but the Reporter adds a *Quære*; for suppose a Man be excommunicated for not coming to Church, or not receiving the Sacrament; how can he do that till his Caution is admitted, and he absolved? *Hill.* 1682. *Archbishop of York* versus ——, 1 *Vern.* 119.

3. An *Excommunicato capiendo* having been awarded, was on Motion superseded before the Return of it, for the Generality of the *Significavit* whereon it was awarded, which was only that the Party was excommunicated *in Quadam causa appellationis & Querelæ*; for the Chancellor held clearly, that till the Return of the Writ, the Court of King's Bench cannot relieve him; and if this Court cannot help him neither till the Return of the Writ, he must in the mean Time lie in Prison; and this he was clear in, without entring into the Question which was made in this Case, whether, after the Writ returned and filed in *B. R.* according to the Statute 5 *Eliz.* that Court had not the sole Power of proceeding on it; for till the Writ returned and filed there, they had nothing to do with it, either by

Way

Way of Quaſhing or Superſeding it on Motion; and two Precedents were cited 10 *Geo.* 1. where ſuch Writs had been ſuperſeded *quia improvide Eman'*, before the Return in *B. R.* and he ſaid the Caſes of *King* and *Fowler*, and of the Biſhop of *St. Davids*, 1 *Salk.* 293, 294. may be good Law, as they were after the Writs returned and filed; and yet this Court could not be ouſted of its Juriſdiction in the mean Time, before the returning and filing of the Writ in *B. R.* And my Lord *Chancellor* ſaid, that at the Common Law the *Excommunicato Capiendo* was not returnable till the *Pluries*, but went firſt, and then an *Alias*; and if that not obeyed, then a *Pluries*; and if not then returned, then an Attachment to the Sheriff. *Hill.* 1717. between *Barlow* and *Collins*.

4. *Thomas Bambridge*, late Deputy Warden of the *Fleet*, was indicted for the Murder of one *Caſtle*, a Priſoner in the *Fleet*, and acquitted; and the Widow brought an Appeal; the Writ was directed to the Sheriff, and returnable the firſt Day of next Term in *B. R.* being iſſued out of the Chancery; the Writ was, *Quia Maria Caſtle fecerit vos ſecur' per Plegios A.* and *B.* (naming them particularly with their Additions) *de appellâ ſuâ proſequend' ideo præcipimus vobis quod attachietis per Corpus, &c.* And now it was moved in Chancery to ſuperſede this Writ, for that in Truth no Pledges were found or entred, notwithſtanding the Naming of them in the Writ, as appeared by Affidavit; and it was ſaid, that Pledges in an Appeal were grounded on the Statute of *Weſtm.* 2. which takes Notice of vexatious Appeals brought by Perſons who had nothing to anſwer Damages, in Caſe they did not proceed, or that the Appellee was acquitted; and the Bringing of a Man's Life twice in Jeopardy, was of ſuch Conſequence, that if the Appellor was not ſufficient to anſwer the Damages, his Pledges or Sureties ought, and therefore were they required to be real, and not fictitious Perſons, like *John Doe* and *Richard Roe*; and they ought likewiſe actually to give Security to proſecute the Appeal. That they could not move in the King's Bench to quaſh this Writ, becauſe it was not returnable there till the firſt Day of the Term; and if they could not move to ſuperſede it here, a Man muſt lie in Priſon without Bail or Mainpriſe for a whole long Vacation, as *Bambridge* has done in this Caſe, upon an erroneous Writ, without Redreſs. It was alſo argued, that the Writ was abſurd, and neither Grammar nor Senſe; for it ſhould have been *Si Maria Caſtle fecerit vos ſecur'*, and not *Quia vos fecerit*, the Word *Quia* relating to the Time paſt, and the Word *Fecerit* to a Time future; and that the Precedents are, *Si A. B. fecerit vos ſecur'*, in the Nature of a Condition precedent; ſo that till the Appellor has made the Sheriff ſecure, by finding of Sureties, he is not to attach him; or it ſhould have been *Quia A. B. nos fecerit ſecur'*; ſo that the Sureties are either to be given to the King before the Iſſuing of the Writ, and then it is *Quia nos*, or to the Sheriff after the Iſſuing thereof, and then it is *Si A. B. fecerit vos*; and ſo are the Precedents in *Raſtal* 44, 46. *Co. Ent.* and others; and the Sheriff may return to the Writ, *Non invenit Plegios*; and though it is ſaid in 2 *Jon.* 154. and other Books, that the Appellor may find Sureties at any Time before Judgment, that cannot be; for then, if the Appellor finds that the Appellee is likely to be acquitted, he will never demand Judgment at all, and then the Party's Life may be brought

twice into Danger, and yet have no Recompence in Damages againſt an unjuſt Appeal; and it was reſembled to an *Excommunicato Capiendo*, which is returnable in *B. R.* they cannot move there to quaſh the Writ till it is returned and filed, becauſe till then the Writ is not in Court, but in the Sheriff's Hands; but if the Writ iſſued *erronice* or *improvide*, this Court from whence it iſſued, may call it in or ſuperſede it; and the Great Seal ought not to be affixed to an eroneous or irregular Writ; but it was argued on the other Side, and agreed by my Lord *Chancellor*, that this Writ did not iſſue *erronice* or *improvide*, that that muſt be ſomething extrinſick to the Writ it ſelf, that if there be any Defect in the Writ, they may move to quaſh it when it comes into the *King's Bench*, if they think fit; that by the Precedents in *Raſtal*, and 2 *Jon.* 154. it appears, that the Appellor may find Sureties in Court, if the Sheriff return *Non invenit plegios*, or even at any Time before Judgment; that the Statute of *Weſtminſter* the Second, was not made for the Finding of Pledges, but for the Puniſhment of the Abettors, and that there were very many Precedents, where no Sureties were actually found, that the Sheriff may, if he will, attach the Party without finding Pledges, becauſe they may be found afterwards, or he may refuſe to attach him, and return *quia Non invenit plegios*, that *quia* A. B. *fecerit vos ſecur'*, becauſe the Party will find Pledges, is as good as *Si fecerit*, and that the Party may either find Sureties to the King, and then it is *Quia nos*, or to the Sheriff, and then it is, *Si vos, &c.* ſo the Motion was diſallowed. *Octob.* the 14th, 1729. *Bambridge's* Caſe.

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